



UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

Faculty Library



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

REPORTS

OF

513

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

J. C. COMPTON.
DURING A PART OF THE

January Term, and at June Term, 1872.

BY THOMAS G. JONES, State Reporter.

4668

VOL. XLVIII.

MONTGOMERY, ALA. :

BARRETT & BROWN, STEAM PRINTERS AND BOOK BINDERS,

1874.

KFA

45

.A2

v. 48

Copy 2

✓
F.L.

\$

Ala 70

AL 11

OFFICERS OF THE COURT,

DURING THE TIME OF THESE DECISIONS.

E. WOLSEY PECK, CHIEF-JUSTICE,

Tuskaloosa, Ala.

THOMAS M. PETERS, ASSOCIATE JUSTICE,

Moulton, Ala.

BENJAMIN F. SAFFOLD, ASSOCIATE JUSTICE,

Selma, Ala.

JOHN W. A. SANFORD, ATTORNEY-GENERAL,

Montgomery, Ala.

DANIEL B. BOOTH, CLERK,

Montgomery, Ala.

PATRICK RAGLAND, MARSHAL,

Bellefonte, Ala.

TABLE OF CASES.

Abercrombie et al. ats. Rodgers et al.	466	Bozeman et al. ats. Wilson....	71
Abrams, <i>Ex parte</i>	151	Brantley & Copeland ats. Shul-	
Adams v. State.....	421	man, Goetter & Weil.....	193
Adams v. Olive et al.....	551	Brown ag't Stoudenmire.....	699
Addison v. State.....	478	Breare ats. Balkum.....	75
Adkins ats. Booker.....	529	Brooks, <i>Ex parte</i>	423
Ala. & Fla. Railroad Co. v. Wal-		Buchanan v. Reese.....	553
ler, Adm'r.....	459	Burns v. State.....	195
Allen ats. Bozeman.....	512	Calhoun, Tax Col. ats. Varner,	
Anderson v. State.....	665	Ex'or.....	178
Ashcraft ats. M. & M. R. R. Co.	15	Camp v. Elston.....	81
Bailey et al. ats. Harkins et al.	376	Candee, <i>Ex parte</i>	386
Bakefield ats. Long.....	608	Cannon v. McNab.....	99
Baker et al. ats. Hubbard, Guar-		Carroll v. Powell, Ex'or.....	298
dian.....	491	Carroll et al. Adm'r v. Vaughn,	
Balkum v. Breare.....	75	Ex'or.....	352
Bank Kentucky ats. Stribbling	451	City of Troy ats. Lockhart et al.	579
Barbour County v. Horn... 566-649		Clark et al. ats. Whitfield et al.	555
Bates, Adm'r, v. Ridgeway.....	611	Clay ats. Neel.....	252
Beavers v. Hardie & Co.....	95	Clegg ats. Watts.....	561
Becton et al. v. Sellick et al....	226	Com'rs Court of Limestone Co.	
Bell, Moore & Co. ats. Marx....	497	v. Rather.....	433
Bell and Murray v. State.....	684	Conn v. Prewitt et al. Adm'rs..	636
Bell, <i>Ex parte</i>	285	Cook et al. ats. Graham.....	103
Benagh, Adm'r, ats. McKinney,		Copeland & Brantley ats. Shul-	
Surv. Partner.....	358	man, Goetter & Weil.....	193
Bennet, Ex'or, et al. ats. Leg-		Cox v. Harris.....	538
gett et al.....	380	Crutcher ats. Johnson, Adm'r..	368
Berry ats. Denechaud.....	591	Curry v. Wilson.....	638
Black et al. ats. Jones et al....	540	Darden v. James.....	33
Blount et al. ats. Bowen, Surv.		David v. Malone.....	428
Partner.....	670	Day ats. Roper.....	509
Bogan v. McCutchen.....	493	De Bardelaben et al. v. Stouden-	
Booker v. Adkins.....	529	mire et al.....	643
Bowen, Sur. Part. v. Blount et al.	670	Denechaud v. Berry.....	591
Bowen et al. v. Montgomery et		Dennis, <i>Ex parte</i>	304
al., Ex'or.....	353	Dismukes, Adm'r, ats. Reynolds	209
Bozeman v. Allen.....	512	Doe, <i>ex dem</i> Wilkerson v. Mc-	
		Dougald.....	383

Dorsey ats. Garlick.....	220	Jones, Adm'r, v. Webster et al.	109
Dumas, Trustee, v. Robbins....	545	Jones, Adm'r, et al. ats. Mor-	
Dunklin & Co. ats. Mixon.....	455	gan et al.....	250
Dunklin & Co. ats. Gamble,		Kirksey et al. v. Friend.....	276
Adm'r.....	425	Leggett et al. v. Bennett, Ex'or,	
Dunklin & Co. ats. Stillman, Mar-		et al.....	380
vin & Hall.....	175	Levy v. State.....	171
Edmonds v. Torrence.....	38	Limestone Comm'rs Court v.	
Ellerbee, Adm'r, ats. Troy, Adm'r	624	Rather.....	433
Elston ats. Camp.....	81	Lindsey et al. v. State.....	169
<i>Ex parte</i> Abrams.....	151	Lockhart et al. v. City of Troy..	579
<i>Ex parte</i> Bell.....	285	Long v. Bakefield.....	608
<i>Ex parte</i> Brooks.....	423	Lorillard v. Sayer & Bouillet....	332
<i>Ex parte</i> Candee.....	386	Maix & Co. ats. Ryall.....	537
<i>Ex parte</i> Dennis.....	304	Malone ats. David.....	428
<i>Ex parte</i> Ware.....	223	Marx v. Bell, Moore & Co....	497
Fariss ats. Humes.....	615	Matthews ats. Jones.....	558
Florence v. Paschal, Adm'r....	458	May and Wife v. Smith, Edwards	
Friend ats. Kirksey et al.....	276	& McKeithen.....	483
Fuller v. State.....	273	Mayor, &c., of Marion v. Welch	291
Gamble, Adm'r, v. Dunklin & Co.	425	Mayor, &c., of Mobile ats. Heller	218
Gardner v. State.....	263	McCuan v. Turrentine, Adm'r,	
Garlick v. Dorsey.....	220	et al.....	68
Graham v. Cook et al.....	103	McCutchen ats. Bogan.....	493
Green ats. Tuska, Scien. & Art.		McDougal ats. Doe <i>ex dem.</i> Wil-	
Association.....	346	kerson.....	383
Gresham et al. v. State.....	625	McDougal ats. Wilkerson, Adm'r	517
Gross ats. Ryan.....	370	McKinney, Surv. part., v. Ben-	
Hagan et al. ats. Mobile County	54	agh, Adm'r.....	358
Hardie & Co. ats. Beavers.....	95	McNab ats. Cannon.....	99
Harkins et al. v. Bailey et al.,	376	Merrett et al. v. Phenix.....	87
Harris ats. Cox.....	538	Miller v. State.....	122
Heller v. Mayor, &c., of Mobile	218	Milner v. Ramsey, Adm'r.....	287
Hightower ats. Shorter, Papot &		Mixon v. Dunklin & Co.....	455
Co.....	526	Mobile County v. Hagan et al....	54
Hill v. Smith et al.....	562	M, & M. R. R. Co. v. Ashcraft..	15
Horn ats. Barbour County....	649-566	Montgomery et al., Ex'or, ats.	
Horst, Mayor, &c. et al. Moses		Bowen et al.....	353
et al.....	129	Moody v. State.....	115
Hubbard, Gu'rd'n, v. Baker et al.	491	Morgan v. State.....	65
Hudson v. Stewart, Adm'r.....	204	Morgan et al. v. Jones, Adm'r,	
Humes, Adm'r, v. Fariss, Adm'r	615	et al.....	250
Hunter v. State.....	272	Moses et al. ats. Horst, Mayor, &c.	129
Ivey ats. Smith.....	48	Murray and Bell v. State.....	675
James ats. Darden.....	33	Neel v. Clay.....	252
John, Guard'n, ats. Waddill, Ex'r	232	Nelson, Administ'r, ats. Waller,	
Johnson, Adm'r, v. Crutchen..	368	Adm'r.....	531
Jones et al. v. Black et al.....	540	Norton et al., ats. Wise, <i>pro ami</i>	214
Jones v. Matthews.....	558	Olive et al., ats. Adams.....	551

TABLE OF CASES.

7

Owen v. State.....	328	South Western R. R. Co. v. Webb	585
Parke v. State.....	266	Spraggins et al. vs. Taylor, Adm'r	520
Paschal, Adm'r, ats. Florence..	458	State ats. Adams.....	421
Payne v. Thompson.....	535	State ats. Addison.....	478
Perez v. State.....	356	State ats. Anderson.....	665
Perry ats. Taylor, Ex'r.....	240	State ats. Bell and Murray....	684
Phenix ats. Merrett, et al.....	87	State ats. Burns.....	195
Powell v. State.....	154	State ats. Fuller.....	273
Powell, Ex'r, ats. Carroll.....	298	State ats. Gardner.....	263
Prewitt ats. Conn.....	636	State ats. Gresham et al.....	625
Quartemas v. State.....	269	State ats. Hunter.....	272
Railroad (Southwestern) v. Webb	585	State ats. Levy.....	171
Railroad Co. (Ala. & Fla.) v.		State ats. Lindsey et al.....	169
Waller, Adm'r.....	459	State ats. Miller.....	122
Railroad (M. & M. R. R.) v.		State ats. Moody.....	115
Aschraft.....	15	State ats. Morgan.....	65
Ramsey, Adm'r, ats. Milner....	287	State ats. Murray and Bell....	675
Rather ats. Com'rs Court of		State ats. Owen.....	328
Limestone co.....	433	State ats. Parke.....	266
Ray, Farley et al., ats. Waller,		State ats. Perez.....	356
Adm'r.....	468	State ats. Powell.....	154
Ray v. Wragg.....	52	State ats. Quartemas.....	269
Reese ats. Buchanan.....	553	State ats. Schuster.....	199
Reynolds ats. Tillman.....	365	State ats. Scott.....	420
Reynolds v. Dismuke's Adm'r..	209	State ats. Strawbridge.....	308
Ridgeway ats. Bates, Adm'r....	611	State ats. Taylor.....	180-157
Robbins, ats. Dumas, Trustee..	545	State ats. Thompson.....	165
Rodgers et al. v. Abercrombie		State ats. Turner.....	549
et al.....	466	State ats. Ward.....	161
Roper v. Day.....	509	State v. Williams.....	85
Ryall v. Maix & Co.....	537	Stewart, Adm'r, ats. Hudson....	204
Ryan v. Gross.....	370	Steadman ats. Sewell & Minshill	519
Sawyer & Boullet v. Lorillard..	332	Stillman, Marvin & Hall v. Dunk-	
Schuster v. State.....	199	lin & Co.....	175
Scott v. State.....	420	Stoudenmire v. Brown.....	699
Screws et al v. Watson.....	628	Stoudenmire v. Ware.....	589
Seawell & Minshill ats. Stead-		Stoudenmire et al. ats. DeBarde-	
man.....	519	laben et al.....	643
Selleck et al. ats. Becton et al..	226	Strawbridge v. State.....	308
Sexton et al. ats. Yerby, County		Stribbling v. The Bank of Ken-	
Superintendent.....	311	tucky.....	451
Shorter, Papot & Co. v. High-		Summerhill v. Trapp.....	363
tower.....	526	Taylor v. State.....	157-180
Shulman, Goetter & Weil v.		Taylor, Ex'r, v. Perry.....	240
Brantly & Copeland.....	193	Taylor, Adm'r, ats. Spraggins et	
Smith, Edwards & McKeithen		al.....	520
ats. May and wife.....	483	Thomas et al. ats. Warnock et al	463
Smith et al. v. Ivey.....	48	Thompson ats. State.....	165
Smith et al. [ats. Hill.....	562	Thompson ats. Payne.....	535

Tillman v. Reynolds.....	365	Ware, <i>Ex parte</i>	223
Torrence ats. Edmonds.....	38	Ware & Wilson v. Warwick....	295
Trapp ats. Summerhill.....	363	Warnock et al. v. Thomas.....	463
Troy, Adm'r, v. Ellerbee, Adm'r,	624	Warwick ats. Ware & Wilson..	295
Troy, City of, ats. Lockhart et al.	579	Watson ats. Screws.....	628
Turner v. State.....	549	Watts v. Clegg.....	561
Turrentine, Adm'r, ats. McCuan	68	Webb ats. Southwestern R. R. Co	585
Tuskaloosa Scientific and Art		Webster et al. ats. Jones, Adm'r,	109
Association v. Green.....	346	Welch v. Mayor, &c., of Marion,	291
Varnier, Ex. v. Calhoun, Tax Col-		Whitfield et al. vs. Clark et al..	555
lector.....	178	Wilkerson, Adm'r, v. McDou-	
Vaughn, Ex'r, ats. Carroll et al.,		gald.....	517
Adm'rs	352	Wilkerson, Doe, <i>ex dem</i> , v. Mc-	
Waddill, Ex'r, v. John, Guard'n,	232	Dougal	383
Waller, Adm'r, v. Nelson, Adm'r,	531	Williams v. State.....	85
Waller, Adm'r, v. Ray, Farley et		Wilson v. Bozeman, et al.....	71
al	468	Wilson ats. Curry.....	638
Waller, Adm'r, v. Ala. & Fla. R.		Wise, <i>pro ami</i> , v. Norton et al.	214
R. Co.....	459	Wragg et al. ats. Ray.....	52
Ward v. State.....	161	Yerby, County Superintendent,	
Ware ats. Stoudenmire.....	589	v. Sexton et al.....	311

TRIBUTE OF RESPECT

TO THE MEMORY OF

HON. ABRAM J. WALKER.

On the first day of the June Term, A. D. 1872, the following proceedings were had in reference to the death of Hon. A. J. WALKER :

EXTRACT FROM MINUTES.

“On the assembling of court, John W. A. Sanford, Esq., Attorney General, in behalf of the members of the bar of the Supreme Court, made known that since the last term A. J. WALKER, a former Chief Justice, had departed this life, and after delivering an eloquent eulogy on the life and character of the deceased, presented the following resolutions, adopted by the bar of the Supreme Court, expressive of their sense of bereavement, and asked that the same be spread upon the minutes :

WHEREAS, Our brother, the Honorable A. J. WALKER, in the meridian of his usefulness and fame, has been taken from our midst.

1. *Resolved*, By the bar of the Supreme Court of Alabama, that we recognize a loss peculiarly our own in the death of one who by the manly sincerity, deep love of truth, rare modesty, christian charity, noble generosity, and devoted patriotism which adorned his character, had endeared himself to the hearts of our entire people.

2. *Resolved*, That as a Judge, our deceased brother honored his high office, and throughout his long judicial career gave to our people an exalted example of an upright and

fearless magistrate, and with a signal ability illustrated the jurisprudence of our State and country.

3. *Resolved*, That we, who knew him long and intimately, and who mourn with feelings of profound sorrow his untimely decease, will ever cherish with fond recollections, and as worthy of all emulation, the gentleness of deportment, the devotion to friends, the unostentatious benevolence, and the simple conscientiousness in the discharge of every duty, which shed a beauty on the walks of his inner life, and made him beloved by all who knew him.

4. *Resolved*, That the Attorney General present these resolutions to the Supreme Court, with a request that the same be spread upon the minutes.

5. *Resolved*, That the clerk of said court be requested to present a copy of these resolutions to the family of the deceased, as an expression of our sincere condolence in their great bereavement.

After the remarks of the Attorney General, George N. Stewart, Esq., spoke feelingly of the many virtues and exalted character of the deceased.

The Chief Justice responded for the court, fully endorsing the expressions contained in the resolutions, and ordered that they be spread upon the minutes.

Thereupon the court adjourned until 10 o'clock to-morrow morning in respect to the memory of the deceased."

The Reporter was unavoidably absent when the resolutions were presented. Neither the remarks of the Attorney General nor of members of the bar, nor the response of the Chief Justice, were entered upon the minutes or published, and it has been impossible to obtain even a synopsis of them. Just as the work is about to go to press, it is found that promised sketches of the life and character of the deceased can not be furnished in time for insertion in the present volume.

Unwilling that the formal minute entry and resolutions should go forth without some further mention of the "manner of man" whose character they commemorate, the Reporter, as a feeble tribute to one who was both his friend and instructor, adds the following sketch, written for the press at the time of Judge Walker's death :

ABRAM JOSEPH WALKER died at Montgomery, Alabama, April 25th, 1872, in the 53d year of his age.

He was born in Davidson county, Tennessee, November 24th, 1819, and was graduated from the University at Nashville ere he reached his twentieth year. After his graduation he studied law in the office of John Trimble, Esq., until the fall of 1841, when, having been admitted to the bar, he removed to Benton (now Calhoun) county, Ala., and there commenced his professional career. Although a mere youth, and without friends or influence, he quickly endeared himself to those among whom he had cast his fortunes. Despite his modest estimate of his own worth, and utter ignorance of those arts by which mere politicians win upon the people, he was soon an acknowledged leader. In 1845, without any solicitation on his part, he was nominated and elected to the House of Representatives in the General Assembly of the State, and in 1848 was an elector on the Cass and Butler ticket. In the exciting canvass of 1851-2 he was elected State Senator from Benton county.

Although his political promotion had been swift and flattering he was not dazzled by it; nor did the enchanting prospects of the future allure him longer to continue in the hustings. The political arena was not congenial to his tastes, and he yearned to devote himself to the law, a profession for which he was peculiarly adapted. Accordingly, doubtless not without a struggle, we find him deliberately turning away from a path which he had hitherto trodden with marked success, to enter upon a career in which he was then untried, but in which he was destined to win nobler and more enduring fame. In 1852 he formed a law partnership with John T. Morgan, removed to Talladega, then an inviting field, and there assiduously devoted himself to the mastery of his profession. Here he won enviable distinction, and soon came to be every where recognized as a profound and able lawyer. Such was the estimation in which he was held, that in 1854 he was elected Chancellor of the Northern Chancery Division. His decrees as Chancellor were rarely appealed from and seldom reversed, and the reasoning by which they were sustained could not often be successfully combatted. His career as Chancellor won for him great reputation, and as

the fruit thereof he was in 1856, on the resignation of Judge Chilton, elected a Justice of the Supreme Court. In 1859 he was elected Chief Justice *vice* Judge Rice, resigned. Judge WALKER continued upon the Bench by successive re-elections until July, 1868, when his office having been vacated by operation of the Reconstruction Acts, he returned to the bar.

During the twelve years that Judge WALKER was Justice and Chief Justice of the Supreme Court, he uniformly discharged all his high duties with fidelity, fearlessness and ability. His decisions will ever remain a proud memorial of his great talent, unwearied industry, convincing logic, keen discrimination, and unswerving love of justice. And of all our Judges none were more blameless in the private walks of life. While yet on the Bench (in 1866) he was appointed Commissioner to revise the Code of Alabama, and acquitted himself of that trust in a manner highly creditable to himself and the State.

Judge WALKER was keenly alive to his duties as a citizen and ever earnest in promoting measures calculated to enhance the welfare and prosperity of the State. Much to his personal inconvenience and loss, he accepted an appointment as one of the Commissioners on the part of the State of Alabama to negotiate the annexation of West Florida, of which measure he was an advocate, and in the spring of 1869 visited Tallahassee, Fla., on that business. That these negotiations failed of accomplishing their main purpose was due entirely to extraneous circumstances, and whatever of success attended them was largely attributable to his efforts.

Judge WALKER was remarkably free from guile—the very soul of sincerity and honor. He had unbounded confidence in his fellow man, and preferred rather to be deceived than to mistrust. Large-hearted and generous, he gave ungrudgingly of his time and money, and was ever ready to lend a helping hand to the weak and oppressed. He was an eminent Mason, and in this noble order found a congenial field in which to work, unseen, for the bereaved and unfortunate. For one of his talents and position he

was singularly modest and retiring, and in his intercourse with the world was as "void of offense" as a child.

In his death Alabama loses one of her truest sons, the bar one of its brightest ornaments, and the community one who combined in an admirable degree many of the noblest qualities of a man.

This sketch can not be more appropriately concluded than by the following eloquent extracts from an address delivered at Huntsville, Ala., in May, 1873, by Joseph H. Johnson, Grand Commander of Knights Templar of the State of Alabama :

* * * * *

"As a jurist, Judge Walker was also distinguished. In the forum, as in every other theatre of his labors, his character shone with pure and conspicuous lustre. Modest and conscientious in the highest degree, and with a nature painfully sensitive, he suffered from the rude shocks of professional controversies in which he engaged ; and never did he undertake a client's cause, without sincere distrust of his ability to manage it ; and never did he fail in that cause without bitter self-reproach for some imagined dereliction of duty.

"The cold fidelity of the salaried agent was not his ; but in the fervor of his ardent advocacy, the distinctive character of attorney melted away, and for the moment the cause of another became his own. This beautiful assimilation, born of a nature at once ardent, trustful, and noble, converted his clients into his friends, whose devotion increased with time, and who clung to him with unwavering fidelity through every vicissitude of fortune, till death broke the bond of union.

* * * * *

"Both at Jacksonville and at Talladega he was thrown into constant competition with some of the ablest, most skillful, and most eloquent lawyers of those days ; some of them still survive, and take rank amongst the foremost of the profession in the South.

"In *this* field, and with *such* antagonists, he won his way

to eminence; and was second to none as a lawyer, and foremost of all as a man. Intelligent, industrious, and learned, beloved and trusted, he threw a weight of ability and character into every forensic contest that he entered, which was well nigh irresistible. His practice became extensive, and his reputation soon reached the limits of the State.

“But despite his fondness for law, and his just ambition of excellence in the practice, the natural infirmity of his disposition made his duties both painful to him, and perilous to his health, and therefore he exchanged the more conspicuous life of an advocate for the more honorable life of a Judge. And never did man wear the ermine more irreproachably than he wore it, as Chancellor, and as Associate, and as Chief-Justice of the Supreme Court of Alabama.

* * * * *

“The young were particularly subject to the spell of his charms, as scores of attorneys who have succeeded him on the stage of duty can attest; because upon these he chiefly strove to impress himself; and these he always cheered and assisted, pointing to the goal of an honorable ambition.”

REPORTS

OF

CASES ARGUED AND DETERMINED

At the January Term, A. D. 1872.

MOBILE & MONTGOMERY RAIL ROAD COMPANY *vs.* ASHCRAFT.

[ACTION BY PASSENGER AGAINST COMMON CARRIER, TO RECOVER DAMAGES
FOR PERSONAL INJURIES OCCASIONED BY RUNNING OFF OF A CAR, &C.]

1. *Declaration of conductor of rail road train ; for what purpose inadmissible.*—In an action for damages against a rail road company for injuries to the person, declarations made by the conductor of the train to a passenger, a moment before the accident, of the bad condition of the road and his train having run off the track five consecutive times next preceding the present trip, are not admissible in proof of negligence, either as *res gestæ*, or as admissions of an agent binding on the principal.
2. *Declarations made by persons leaping from car to avoid injury ; when and for what purpose admissible.*—The plaintiff having received his injuries by leaping from the car, while others who remained inside were not hurt, it is proper for him to prove that others besides himself did the same, and also their declarations at the time of their reasons for so doing, to show the reasonableness of his conduct and to avoid the charge of contributory negligence.
3. *Running off of train consecutively before accident ; when legitimate evidence.*—In an action by a passenger to recover damages for personal injuries occasioned by a run-off, evidence that the train on which the accident occurred and of which witness was conductor, had run off the track seven or eight times within a month before the accident, is admissible.
4. *Damages, actual and punitive ; guide for assessing.*—Punitive damages may be recovered for gross negligence. For a less degree actual damages alone should be assessed.
5. *Bell-rope ; neglect to reach through passenger car.*—A charge that the defendant would be liable if the bell-rope did not reach through the

Mobile and Montgomery Railroad Co. v. Ashcraft.

passenger car, at the end of a train, is erroneous ; the neglect must appear to have caused or contributed to the injury.

6. *Damages, punitive ; how assessed.* Punitive damages ought to bear proportion to the actual damages sustained. Wherever the assessment is manifestly unjust, whether it is too small or excessive, the court, in the exercise of a wise and just discretion, should award a new trial.

APPEAL from Circuit Court of Crenshaw.

Tried before Hon. P. O. HARPER.

This was an action on the case containing two counts, brought by appellee against appellant, a common carrier of passengers, to recover damages for injuries received while traveling on one of its trains.

The *gravamen* of the first count was that defendant negligently suffered and permitted its road-bed and track to be in such bad order and condition, that by reason thereof the car in which plaintiff was traveling was thrown from the track, and by negligence of defendant in not having a cord attached to the bell of the engine and passing through the car on which defendant was, no signal could be given the engineer to stop, whereby plaintiff received the injuries complained of.

The *gravamen* of the second count was that defendant failed to use due and proper care safely to convey defendant to his destination, whereby the car on which plaintiff was traveling was thrown from the track, and the conductor jumped off, and there being no bell cord, passing from the bell on the engine to the car, it was impossible to signal the engineer to stop the train, whereby the car was dragged, pulled and jerked along the track for a long distance, by means whereof plaintiff received the injuries complained of, &c.

The suit was originally brought to the circuit court of Butler, but on application of the defendant the venue was changed to Crenshaw county, where the trial was had on the plea of the general issue, "with an agreement between the parties that any matter of defense and reply might be given in evidence under the plea of the general issue, as though specially pleaded and replied."

On the 14th day of April, 1870, plaintiff, who was an old man, 68 years of age, got on a "cab-car" of a freight train at Greenville, Ala., to go to Montgomery. Near Gilmer's switch, "in the prairies," where the soil is such that rains very easily injure the track and road-bed, the front truck-wheels of the "cab-car," which was the last car, except one, of a long freight train, ran off the track. Behind the cab-car was a car heavily loaded with sugar and molasses, and "coupled" to the "cab-car." This loaded car remained on the track as did also the car to which the front end of the "cab-car" was "coupled." The train dragged the "cab," with the loaded car behind, for a distance of several hundred yards before the train stopped, when it was found that the "cab" had been considerably shaken, the front trucks having badly "splintered" the floor. While the car was thus being dragged along, at the rate of from 12 to 14 miles per hour, the conductor jumped off, then the brakeman, then one Hannon threw off a little boy in his charge and followed himself, after which plaintiff jumped off and received the injuries complained of. Persons who remained in the cab-car were not hurt.

The plaintiff testified that, in jumping off, his forehead was gashed, his nose caused to bleed, his left ankle badly sprained, by jumping off out of the car, so much so that he was unfit for any business for two months. After the accident plaintiff rode to Montgomery on a flat car; had to be helped off the car into a hack; attended with much difficulty to some business next day, and then returned home; it was a long time before his head was free from pain.

Two of plaintiff's sons testified that he lost nine weeks time; that he was confined to the house five weeks, thereby losing opportunity to plant a crop and being kept from a small mill. Witnesses did not think "he made any year \$500 at the mill. Plaintiff had been a carpenter before the war, but had not worked at his trade since. These witnesses thought his actual losses about \$1,200."

Plaintiff's family physician, called on behalf of defendant, testified that he was not called to see plaintiff until

Mobile and Montgomery Railroad Co. v. Ashcraft.

about a month after the accident; that when he was called in plaintiff was suffering a great deal from a pain in the head which witness thought was occasioned by the rail road accident; that in a short time he recovered and was then as well capable of carrying on his business as before the hurt, and witness did not think his health had been injured, except that plaintiff complained of his head; that his bill would not be over \$40; that plaintiff was disabled from attending to business for a month.

It was admitted that three absent witnesses of defendant, if present, would testify that they were, and for several years have been, neighbors of plaintiff; that he has been in the same pecuniary condition as at present for many years; that his labor and services on the farm are not worth over fifty dollars per month, and that with the exception of a month, said to have been lost by reason of the hurt, plaintiff has been at work on his farm, apparently in as good health as ever.

Another physician testified that he had not made any examination of plaintiff's injuries, but that from observing him since then, he could see no difference in his walk or movements. Plaintiff has no regular occupation; he carried on a little farm and some times worked at his trade on jobs in the neighborhood.

William H. Hannon, one of plaintiff's witnesses, who was on the train at the time of the accident, testified that "a short time before the accident occurred he entered into a conversation with the conductor in charge of the train, whereupon the conductor commenced a conversation about the perils of traveling over defendant's road, and stated that he had expected to run off that trip, but believed that he had then passed over the most dangerous places; that he had run off for five consecutive trips before the one he was then making, and said he had as leave go into a battle as to run a train over that road; that during this conversation, and just as the last remark was made, the cab in which the witness, conductor, and other passengers were, ran off, or was thrown from the iron rails. The

defendant objected to the introduction in evidence of this conversation, but the court overruled the objection, and permitted the evidence to be introduced, and the defendant excepted. The witness Hannon further testified that immediately after the cab ran off, the conductor rose and without any pause ran to the door of the cab and jumped out, and that he was the first person who did jump out, or off the train; that witness saw but one brakeman on the train, who was a negro named Munroe, (and there was no evidence that there was any other brakeman on the train,) and that said Munroe jumped off immediately after the conductor. The plaintiff asked this witness what the brakeman said as to why he had jumped off? The defendant objected to this question, but the court overruled the objection, and allowed the question to be asked, to which the defendant excepted. The witness answered that the brakeman said, "that when he saw the conductor jump off, he thought it was time for him to go too." The evidence showed, in connection with this question to the witness, that when the brakeman made this remark, the train had not been stopped; that it was soon after the witness had jumped off, as hereinafter stated, and just before the plaintiff had jumped off, as hereinafter stated. The defendant excepted to the ruling of the court in allowing the question to be asked and the answer to be given. The witness Hannon further testified, that the little boy under his charge then started to jump out, but that witness caught and held him, until he thought he saw a good chance, when he threw the little boy out into a ditch; that witness then himself jumped out; that the plaintiff next jumped out, and received a cut upon his head, and other injuries.

Plaintiff then asked the witness why he had jumped off the passenger cab as he had testified he did, and why he had thrown the little boy off as he had testified he did. To each of these questions the defendant objected separately; but the court overruled each objection, and permitted the witness to answer each question, and to each of

said rulings of the court the defendant separately excepted. The witness answered that he jumped off, and threw the little boy off because he thought it was safer under the circumstances to do so than it was to remain on the cab with the little boy."

The witness Hannon testified that he had traveled a great deal on rail roads.

The testimony was conflicting as to whether there was a bell cord attached to the engine and extending through the train to the cab-car, some of the witnesses testifying that there was none, and the conductor testifying that it reached half way into the cab-car, but had been caught in some way so that he could not signal the engineer to stop, when he tried to pull it just before jumping off.

The court, against defendant's objection, permitted the witness Hannon to be asked (for the purpose of showing that defendant received passengers alike on both freight and passenger trains, and charged the same price,) "whether he had or not, about the time plaintiff was injured and within a short time before and after, taken passage from Greenville to Montgomery at different times on both freight and passenger trains." The witness answered that he had, about the time enquired of, frequently traveled from Greenville to Montgomery on both freight and passenger trains, and that he paid the same fare on both trains. To the overruling of its objection and the ruling of the court permitting the witness to answer, defendant duly excepted.

Hughins, the conductor of the train at the time of the "run off," testified that for several days prior to the accident the weather had been very wet and rainy; that on such prairie soil as that where the accident occurred it was hard to keep the track in order; "that after the accident witness went back to where the wheels of the 'cab-car' ran off the track;" that the occurrence which resulted in the injury of plaintiff was occasioned by what rail road men call a "low joint;" that a "low joint" occurs where the cross-tie on which two rails are joined, and one or

more other cross-ties next on one side of the joint, sink out of place, which causes the depression of one rail, while that joined to it remains in position. In such cases the spikes, having the "chair," or piece of iron holding together the ends of the rails, pull out and the "chair" breaks, while the end of one rail is depressed and the other puts up, and this throws the car off; that in the present case the cross-tie holding the chair had sunk—that the spikes had pulled out leaving the end of one rail jutting up, and that this had thrown the front truck of the cab-car off; that the heavy rains that had fallen shortly before the time of the accident had caused this low joint; that such is the nature of the soil where the accident occurred, that, where heavy rains fall the cross-ties may some times sink suddenly under the weight of a heavily loaded car; that such, in the opinion of witness, was the case here. Witness stated that he had been at the time of the accident a conductor of rail road trains for three years continuously, and was well acquainted with rail roading; that the train on which the accident occurred consisted of twelve cars—that the passenger cab was the eleventh, and that the twelfth car was in the rear of the passenger cab, and was loaded with hogsheads of sugar and barrels of molasses. Defendant then proposed to ask the witness whether, in his opinion, the "low joint" which, in his opinion, had caused the accident, was caused by the passage of the train to which the accident occurred or some previous train. The plaintiff objected to this question, on the ground that it could not be a question of skill or science upon which the witness could give his opinion, as to what particular train or car, if any, caused the low joint. The court sustained the objection and refused to permit the question, and the defendant excepted.

This witness further testified, that finding his bell rope, which reached half way in the "cab," was caught, he immediately jumped off so as to give the signal, and did signal by hand, to the engineer to stop. On cross examination, being asked by plaintiff to explain why the "low

joint," which in his opinion, had thrown off the cab, did not likewise throw off the last car, the witness stated that he was unable to give the explanation.

This witness was also asked on cross-examination how often, within a month immediately preceding the injury to plaintiff, the freight trains of which he was conductor, had run off. Defendant objected to this question as being illegal and irrelevant, but the court overruled the objection, and the defendant excepted. The witness answered seven or eight times.

C. P. Ball, a witness for defendant, who was proved to have been a man of skill in rail road matters, and for many years connected with them, and who was the assistant superintendent of the road, after testifying at length as to the condition of the road, the "means and number of employees used to keep it up," was asked on cross-examination if accidents did not more frequently happen to defendant's freight trains than to its passenger trains, and if they did not more frequently run off about the time plaintiff was injured, than did the passenger trains.

To this question defendant objected. The plaintiff stated that the object of the question was to show negligence of defendant in regard to its freight trains. The court overruled the objection of defendant and permitted said question to be asked, and defendant excepted. The witness answered that about the time plaintiff was injured accidents were frequent to the freight trains, and that they rarely occurred to the passenger trains.

The court gave the following charges, to which defendant excepted :

"3. That if the negligence of defendant, as charged in the complaint, had been established by the evidence, to the satisfaction of the jury ; and that if the evidence further showed that the plaintiff had been injured thereby, and had suffered physical pain and mental distress as the direct consequences of such injuries, that then the jury, taking into view all the circumstances of the case, might, in their discretion, assess against defendant damages over

and above the amount of the actual damages the proof might show the plaintiff had sustained, but that in assessing such damages they, the damages, should not be unreasonable in amount, and should not be prompted by prejudice, passion, or partiality. That as had been said by our own supreme court, (*Rhodes vs. Roberts*, 1 *Stewart*,) negligence might be very gross and reprehensible; and if in this case the jury believed that the negligence was gross and reprehensible, they might give smart damages; but that whether it had been so or not, in the present case, was a question for the determination of the jury under all the evidence in the cause."

"4. That the statute law of Alabama requires a conductor on every passenger train on any rail road in this State, at any time when his train is in motion, to have a cord attached to the bell on the engine and passing through each passenger car attached to his train; that any rail road train which takes passengers on board for transportation in this State is a passenger train within the meaning of this statute; and that if the jury believe, from the evidence, that the train on which it is contended the plaintiff was a passenger, did not have a bell rope attached to the bell on the engine and running back clear through the car on which it is contended plaintiff was a passenger, then the defendant would be liable in this case." To this charge the defendant excepted. The bill of exceptions immediately recites that "the court did not mean by the last mentioned charge to charge upon the effect of the evidence, nor was the charge given last above stated excepted to at the time it was given, on the ground that it was a charge upon the effect of the testimony; the counsel for defendant not mentioning any ground of exception at the time of the exception. The court meant simply to charge that if the bell rope did not run entirely through the passenger car the rail road company were in default; but the charge was given without this explanation." The court further charged the jury, but not in immediate connection with this charge, that the jury must look to all the facts and

circumstances of the case in evidence to ascertain whether the defendant was liable.

The defendant then asked the following charges in writing, each of which the court refused, and to each of which refusals the defendant excepted :

"3. That unless the proof shows that the plaintiff was injured by the defendant wilfully, or by the wilful negligence of defendant, or by some act or omission of duty amounting to a wilful disregard of duty, the plaintiff is not entitled to recover exemplary damages."

"4. That if the evidence shows that the defendant fairly and honestly used every means known to rail road men to prevent accidents on their rail road, and were not guilty of any wilful or gross disregard of duty, then the plaintiff could not recover more damages than he has actually sustained, if entitled to recover at all."

"5. That if the company used all ordinary means for the preservation and safety of the passengers on the trains upon which plaintiff was traveling, and was not guilty of any wilful disregard of duty, then the plaintiff, if entitled to recover at all, can only recover such actual damages as he had proven."

"6. That the plaintiff, on the evidence in this case, can not recover anything more than the actual damages sustained, unless the evidence shows such gross negligence as amounts to a wilful disregard of duty, even if entitled to recover at all."

The court, at the request of the defendant, charged that the fact that the defendant is a corporation does not entitle the plaintiff to any more damages, if entitled to any at all, than if the defendant were a natural person.

The jury found a verdict for plaintiff, and assessed his damages at \$4,000 00, and hence this appeal.

The various rulings of the court below, to which exception was reserved, the giving of the charges excepted to, and the refusal to give the charges asked, are now assigned as error.

HERBERT & BUELL, and RICE, CHILTON & JONES, for appellant.—1. The evidence as to the conductor's conversation with Hannon was clearly inadmissible. It occurred before the car ran off, ceased at once, had no connection with the run off, and was not even shown to have been made in presence of appellee. It constitutes no part of the *res gestæ*.—20 Ala. 126; 1 Greenleaf Ev. § 113; Starkie, 89; *Evans v. Cochran & Estill*, 18 Ala. 479; *Brown v. Harrison*, 17 Ala. 774.

2. The testimony as to what the brakeman said *after* he had jumped off was inadmissible. Appellee neither heard nor was influenced by it. It was but an unsworn narrative of a then past event.

3. Allowing Hannon to state why he threw the little boy off was clearly improper. His statement, that he did it because he "*thought* it was safer, &c.," was but a mere giving of his unsworn opinion. It is not shown that he was an expert. The witness evidently referred to his opinion *at the time* of the accident, and that might have been influenced by fear and entirely incorrect.—See 23 Ala. 469; 27 Ala. 480; 24 Ala. 201.

4. Witness Huggins was a skilled witness and should have been permitted to answer the question asked of him. 24 Ala. 21.

5. There being no case in this State, clearly defining and measuring the rule of damages in a case of this sort, it is important for the future that it be definitely settled. Any indefiniteness is apt to lead to speculative law suits. The law should hold common carriers strictly responsible for *actual* damages, but beyond this, in the absence of *fraud*, *malice* or oppressive intent, they should not be held. Sedgwick on Damages, 35.

Carriers of passengers are not insurers—they must exercise the highest degree of skill and care, but if after this unavoidable accident occur, they are not liable.—2 Redfield on Railways, 178–84. The proposition that any negligence is gross negligence can not be maintained.—Shearman

& Redfield on Negligence, § 600. The verdict under the evidence is excessive. At most, it is impossible for the appellee to have lost over two hundred dollars in *actual damage*; the proof can not justify the charge of gross negligence, and yet \$4,000 is the verdict for a slight rail road injury.—*Heil v. Glanding*, 42 Pa.

6. Punitive damages can have no foundation unless based on *gross* neglect.—*Shear. & Red. on Negligence*. The third direct charge is so worded, as to allow punitive damages without the gross neglect. Of the charge about the bell rope it need only be said, that it makes defendant liable, without any regard whatever to the fact whether the want of bell-rope had any thing, one way or the other, to do with the accident, either directly or indirectly. Tested by the rules of law enunciated above, the charges requested by defendant should have been given.

7. The questions permitted to be answered as to the train running off before the accident, were calculated to, and did bring out illegal evidence. The issue was whether at *this time* there was neglect; not whether the conductor had been negligent at other times. If such testimony be admissible to show negligence, why may not testimony that for months before the run-off no accident had occurred, be admissible to show due care? Admitting negligence in the past accidents is not legal proof that there was negligence in this. If plaintiff may go into past accidents, defendant would have the right to show that they were all by unavoidable accident, and thus the court in trying one case of this kind would have to settle numerous others; admitting such evidence unsettles all well-established rules on the subject. The effect of its admission was only to prejudice the defendant.

8. The question to Huggins, as to what train caused the "low joint," was proper. Plaintiff sought to fix gross negligence on defendant. If some other train had made it and some time had been allowed to elapse and another train allowed to run over it before the defendants' servants remedied it, that might constitute reprehensible negli-

gence, when, if the low joint were occasioned by the train that ran off, it might be unavoidable accident. Whether it was accident or neglect is for the jury to say, and it was material in determining that question for the jury to know what train caused the "low joint."

JUDGE & HOLTZCLAW, and WATTS & TROY, *contra*.—1. The conversation had with the conductor was properly admitted. Corporations can act only by agents, who are often, for all practical purposes, the corporation itself. The conversation was within the scope of conductor's authority, while he was performing the duties of his agency and carrying on the business of the principal—*dum fervet opus*. The conversation was part of the *res gestæ*, besides being a declaration binding on the defendant.—*Morse v. Conn. R. R.*, 6 Gray, 450.

2. The declarations of the brakeman were competent. They were part of the *res gestæ*, and were evidence of a very high grade to show that defendant acted prudently in jumping off.—2 Redfield on Railways, § 179.

3. The question to Huggins was improper. It made no difference what train made the "low joint." If the "low joint" was occasioned by negligence, it matters not who occasioned it. The testimony of the witness shows that his opinions on this matter were mere guesses. No facts were given or means stated, whereby the witness could judge that the "low joint" was occasioned by one train or another.

4. The questions to Huggins as to how often his train had run off, &c., were proper. The answer showed habitual neglect, or that road and machinery were out of repair, and hence, that greater care and skill than was bestowed were needed. The question was confined to the time almost immediately preceding. The question to Ball as to the "freight trains running off oftener than passenger," &c., falls under the same reasoning. Taking passengers on the freight train, the defendant was bound to use the same care as if the passenger was in the regular passenger

train. The fact that passenger trains seldom ran off, while the freight trains often did during the same period, manifestly showed negligence on the part of the defendant's servants in charge of the freight train.

5. The testimony of Hannon as to why he threw off the little boy, was clearly competent. The plaintiff must have had reasonable cause to believe he was in danger to justify his leaping from the car. The effect made on the minds of persons in the car with him—evidenced by what they said and did at the time—is the most satisfactory kind of evidence to refute a charge of contributory negligence. The witness was an experienced traveler by rail, and it was competent for him to give his opinion as to whether it was safer to jump or remain.

6. The charges given and refused, must of course be considered in reference to the evidence. The court will see from an inspection of the Record that defendant had its case *fairly* submitted to the jury. As to the measure of damages in a case like this, see 2 Redfield on Railways, 220. *Such verdicts are the only corrective of oftentimes a most flagrant disregard of human life, &c.* The testimony certainly tended to show great negligence in this case. The defendant took passengers on both freight and passenger trains. The freight trains were all the time running off, and the passenger trains seldom doing so. There was, therefore, a proper predicate for the affirmative charges of the court on that subject.—See *Day v. Wadsworth*, 13 Howard, U. S. 363.

As to what suffering and pain should be compensated for, see 22 Conn. 293; 29 Conn. 390; 32 Maine, 271; 13 California, 599.

7. Rail roads, though not insurers of passengers, are held to the "*utmost* watchfulness and care."—21 Howard U. S. 202; 18 New York, (4 Smith) 168. Therefore, there is no difference in such cases between "negligence" and "gross negligence."—16 Howard, 469; 2 Redfield on Railways, 210.

8. The first affirmative charge excepted to was correct.

11 Grattan, 697 ; 16 Pickering, 547 ; 13 B. Monroe, 219 ; 35 Pa. State Rep. 60.

9. The second affirmative charge excepted to only asserts, if looked to carefully, that defendant would be liable for *nominal* damages, if there was no bell rope, and plaintiff was injured on such train.—*Bagley v. Hains*, 9 Ala. 173.

10. The object of the statute was to have the bell rope in reach of every passenger in case of accident. Half way compliance with the law amounts to nothing. One of the issues was as to negligence in not having a bell rope, &c. If this was found in favor of plaintiff, he is always entitled to at least a *nominal* verdict of damages.

11. The charges asked by defendant were properly refused. They based the plaintiff's right to recover on "*wilfulness*," or "*wilful neglect*," or "*wilful disregard of duty*," &c. Any neglect by carrier is gross enough to allow exemplary damages. The other charges were bad generally ; they are mingled with the proposition, "*if the plaintiff is entitled to recover at all*," as though the judge should say (as he would in giving them) it is doubtful if plaintiff has made out a case.

B. F. SAFFOLD, J.—The suit was for damages on account of injuries received by the appellee, through the negligence of the appellants, as common carriers of passengers.

The plaintiff's witness, Hannon, was permitted to tell what the conductor of the train on which the plaintiff and the witness were, at the time of the accident, said to him a moment before the occurrence, about the bad condition of the road, and his running off the track five consecutive times before this trip. These declarations can not be considered as any part of the *res gestæ*, because they did not spring out of the accident, conduce to it, or have any necessary connection with it. If they are receivable, they must be so, as an admission of an agent binding on the defendant, of the bad condition of the road. In *Fairlie vs. Hastings*, 10 Vesey, 123, Sir William Grant has drawn

Mobile and Montgomery Railroad Co. v. Ashcraft.

so clear and correct a line of separation on this subject of the admissibility of statements made by an agent, that it is sufficiently decisive of this point merely to repeat what he says: "As a general proposition, what one man says not upon oath, can not be evidence against another man. The exception must arise out of some peculiarity of situation coupled with the declaration. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and, in many cases, by his acts. What the agent has said may be what constitutes the agreement of the principal, or, the representations or statements made by him may be the foundation or the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted, to prove that the agent did make that statement or representation. So, with regard to acts done, the words with which those acts are accompanied, frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But, except in one or other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact can not amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent. The admission of an agent can not be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting any thing which any person has asserted as to him, as to his conduct or his agreement, merely because that person has been his agent. If any fact material to the interest of either party rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion."

It is true, there is a difference between the agent of a corporation and the agent of an individual, because the corporation, if it act or speak at all, can do so only through an agent. Some of its agents are in some instances the corporation itself, and others are its mere employees or

servants. It would be equally unjust to charge it with all the statements of its agents, or to relieve it entirely from responsibility for such declarations. If the statements of the conductor had been made the day before the accident, they would not be supposed to be the admissions of the defendant, or to be a part of the *res gestæ*. Their coincidence alone, without other connection, can not change their character.

The plaintiff jumped from the car and received his injuries in doing so. Other passengers who remained in the car were not hurt. If he contributed to his own injury by want of proper care, he would not be entitled to recover. The degree of care required of him is in proportion to the degree and imminence of the danger. It was very necessary for him to show that his share in the transaction was innocent, and not incautious. This he undertook to do by proving that the conductor and the brakeman leaped off, and that a passenger, with deliberation, took up and dropped into a ditch a small boy, his relative, and then jumped off himself, as well as proving reasons given by this passenger and the brakeman at the time why they did so. We regard these declarations as a part of the *res gestæ*, and more convincing of the reasonableness of abandoning the car, or, at least, the absence of any negligence, recklessness or undue fright, than the testimony to that effect of the persons themselves some time after the occurrence.—1 Phil. Ev. 185.

The accident occurred to a freight train having one passenger car attached. The witness was very properly permitted to say that he had frequently traveled on the road about the time of the accident, on both the passenger and freight trains, and therefore knew that passengers were received on the freight train, and charged the same price, as on the other.

It was a mere conjecture of the witness Huggins that the car had been thrown off the track by a "low joint," or that there was a "low joint." He could not, therefore, give an opinion as to which train had made it.

The testimony of this witness, that the freight trains, of which he was conductor, had run off the track seven or eight times within a month next preceding the injury to the plaintiff, was legitimate.—Shearman & Redfield on Negligence, § 448.

There was no error in the plaintiff's asking the assistant superintendent of the road, Ball, if the freight trains did not more frequently run off the track about the time of the accident, than the passenger trains.

The charges given and refused, to which exception was taken, may best be considered together. The third and fourth direct charges were erroneous. The first, because it asserted that negligence sufficient only for the recovery of actual damages would authorize a verdict for greater damages. In cases of this sort there are but two degrees of negligence, and two measures of damages for it. One, for which the actual damages, consisting of the expense of cure, time lost, and fair compensation for physical and mental suffering, and a permanent reduction of the power to earn money, may be recovered. The other, gross negligence, for which exemplary or punitive damages may be given.

The second, because it conveyed to the jury the impression that the neglect to have the bell rope reach through the passenger car, would alone authorize a verdict of actual damages, at least, in favor of the plaintiff. This is not so, without such neglect was the cause of the injury. The jury was not left at liberty to find whether it was or not.

It seems to be clearly established by the American authorities that exemplary, vindictive, or punitive damages can never be recovered in actions upon any thing less than gross negligence.—Shearman & Redfield on Negligence, § 600.

Gross negligence is defined to be the want of even slight care and diligence. In determining what amounts to any specified degree of care in each particular case, the thing to be taken care of, and the danger to which it is exposed, are the chief considerations. The law exacts a greater

Darden v. James.

degree of care in respect to life, than to property. From those whose occupation involves great risk of life, it demands the utmost care. In such cases gross negligence is attained much short of that culpable degree which by the common law is denominated crime. Of course gross negligence may be of more or less aggravated character requiring a corresponding graduation of the amount of damages to be assessed. The punitive damages ought also to bear proportion to the actual damages sustained.

The court very properly charged the jury that greater damages ought not to be assessed against a corporation, than should be against an individual, under the same circumstances. It is the province of the court to see that justice is done, and when the assessment is manifestly unjust, whether too small or excessive, a new trial should be granted. This, however, should be done, not arbitrarily, but in the exercise of a wise and just discretion.

The judgment is reversed and the cause remanded.

DARDEN vs. JAMES.

[APPEAL TO SUPREME COURT TO SET ASIDE NON-SUIT.]

1. *Non-suit under § 2759 of Revised Code; what rulings not reviewed on appeal from.*—Where a complaint contains a count on a special agreement, with the common counts, and a demurrer to the special count is sustained, and the parties go to trial on the common counts, and on the trial evidence offered by the plaintiff is excluded by the court, and, thereupon, the plaintiff excepts to the ruling of the court, and suffers a non-suit under § 2759 of the Revised Code, and appeals to this court to have the non-suit set aside, the decision of the court on the demurrer cannot be reviewed on such appeal.
2. *Indebitatus assumpsit; when will lie.*—Where the terms of a special unsealed agreement have been performed by the plaintiff, so that only a duty to pay money remains, *indebitatus assumpsit* will lie, but where the agreement is still open, or is to be performed in future, the count must be framed on the agreement.

Darden v. James.

3. *Plaintiff failing on special count ; when may recover on general counts.*
Where the plaintiff declares on a special agreement, seeking to recover thereon, but fails, he may recover on the general counts, if the case be such that he might have recovered, if there had been no special contract.
4. *Recovery, when may be had on common counts ; when on special contract.*
If the plaintiff's right to the money depends upon a subsisting agreement between the parties, the action must be upon the special contract ; but if the plaintiff's right to the money is wholly independent of the agreement, then he may recover on the common counts.
5. *Damages for breach of special contract ; upon what, plaintiff must count to recover.*—Where damages are claimed for the breach of a special contract, the plaintiff must count upon the contract.

APPEAL from Circuit Court of Chambers.

Tried before Hon. LITTLEBERRY STRANGE.

THIS was an action commenced by E. D. McKinstry and appellant Darden, merchants and co-partners, under the firm name and style of McKinstry & Darden, against the appellee. McKinstry having died before trial, the suit proceeded in the name of Darden as surviving partner.

The complaint contained five counts : 1st. Common counts for goods, wares and merchandise sold and delivered, &c. 2d. A count on an account stated. 3d. A count on a settlement and compromise of all matters between plaintiff and defendant. 4th. A count for money had and received by defendant to and for the use of plaintiff. 5th. A special count, founded upon a special agreement under the hands and seals of the parties, dated 21st March, 1857. The count sets out the special agreement in *haec verba*, but it is only necessary to a proper understanding of the opinion, to state the substance of the agreement, which was as follows : Appellant and appellees both claimed to be owners by assignment of the interest of N. J. Smith in his father's estate. On a trial of their respective rights, judgment was rendered in favor of appellant, condemning the interest of N. J. Smith in the hands of the administrator of Smith's father, who had been garnished, &c. To prevent further litigation on appeal to the supreme court, the parties to this suit entered into the special agreement. It recites that " it is agreed that the said James shall, and

he has paid, contemporaneously with the agreement, the following sums, viz: \$215 00," amount of [appellant's] judgment against N. J. Smith; "also one hundred dollars to McKinstry & Darden for other claims against Smith;" also one hundred and fifty dollars to attorneys of Darden & McKinstry for obtaining judgment against Smith's administrator; and said James also releases all his right to N. J. Smith's interest in the estate of Levi Smith.

In consideration of the payments and releases, Darden & McKinstry agreed to perform certain conditions not necessary to be further noticed.

The special count then alleges full performance on part of plaintiff of the provisions of the special agreement, and assigns as among other breaches on the part of James—1st. That he refuses to pay two hundred and fifteen dollars, the amount of plaintiff's judgment against N. J. Smith. 2d. That he refuses to pay the \$150 to the attorneys of appellant for obtaining the judgment against Smith's administrator, and then concludes, "wherefore, the plaintiffs say that they are injured, and have sustained damage to the amount of \$818 14, with interest thereon, from 21st of March, A. D. 1857."

The defendant demurred to the special count, and each of the breaches assigned, and the court sustained each of the demurrers, whereupon the cause proceeded to trial on issue joined on the remaining counts.

The court, on the objection of defendant, excluded certain portions of the deposition of John L. C. Danner, who proved the execution of the special agreement, in relation to the payment of the \$215, therein mentioned, the amount of the judgment against N. J. Smith. The plaintiff then offered the excluded portion of the deposition, in connection with proof then proposed to be made by a witness then on the stand, as to what occurred at the time of the special agreement as to the payment of the \$215, &c.

The bill of exceptions concludes as follows: "The court ruled, upon the objection of defendant, that the said proof connected with the other proof was illegal, and refused to

allow it to be made, and to which refusal plaintiffs excepted ; and in consequence of the said several rulings of the court adverse to the said plaintiff, he could not proceed further in his cause, and it became necessary for him to suffer a non-suit, and to ask leave of the court to take a non-suit, under the statute, with a bill of exceptions, with leave to move in the supreme court to set said non-suit aside, and to assign said several rulings for error, and this leave being granted, plaintiff took a non-suit, with leave," &c. There-upon judgment was rendered against plaintiff for costs, and he appeals to this court, and assigns for errors the ruling of the court in the exclusion of evidence as shown in the bill of exception, and the sustaining of the demurrer to the special count, and to the several breaches therein assigned.

MORGAN, BRAGG & THORINGTON, for appellant.

G. W. GUNN, *contra*.

PECK, C. J.—Can the ruling of the court, sustaining the demurrer to the special count of the complaint, be reviewed on this appeal? Where a plaintiff takes a non-suit, the right to appeal to this court, to have the same set aside, is given by § 2759 of the Revised Code, which is in the following words, to-wit: "When, from any decision of the court, on the trial of a cause, it may become necessary for the plaintiff to suffer a non-suit, the facts, point or decision, may be reserved for the decision of the supreme court, by bill of exceptions, as in other cases." As this right is given and depends, wholly, upon this section of the Revised Code, it must be confined and limited to cases clearly within its purview and meaning. We hold, that this section does not apply to decisions of the court, made on demurrers to the pleadings, but to such decisions of the court, only, as are necessarily made a part of the record, by a bill of exceptions ; and as a bill of exceptions is never necessary to enable the plaintiff to revise the decision of the court, sustaining a demurrer to his complaint, such a decision does not authorize him, under said section,

to suffer a non-suit, and appeal to this court, to have the same set aside.

2. The demurrer to the special count being sustained, the case, then, stood on the common counts only, and on them, it is very clear, the plaintiff could not recover. The common counts are only appropriate, when the action is *indebitatus assumpsit*, or debt on simple contract.

In this case, the action is neither the one nor the other, but an action, in the nature of an action of covenant, founded on a special agreement, under the hands and seals of the parties, imposing on them mutual and reciprocal obligations.

The evidence offered by the plaintiff, and excluded by the court, disclosed the special agreement, set out in the special count of the complaint, to which the demurrer had been sustained. This evidence showed that the defendant's liability, whatever it might be, depended upon said special agreement, and, therefore, a recovery could only be had on a count framed on said agreement, and not on the common counts.

The rule is, where the terms of a special *unsealed* agreement have been performed by the plaintiff, so that only a duty to pay money remains, *indebitatus assumpsit* will lie, but where the agreement is still open, or is to be performed in future, the count must be framed on the agreement. *Hunter v. Waldron*, 7 Ala. 753; 1 Saunder's Rep. 269 a, note (m.)

Where the plaintiff's right to the money depends upon a subsisting agreement between the parties, the action must be on the agreement, but, if the plaintiff's right to the money is wholly independent of the agreement, he may then recover on the common counts.—*Stent v. Hunt*, 3 Hill's (S. C.) 223. But where damages are claimed for the breach of a special contract, the plaintiff must count upon the contract.—*Royalton v. R. & W. Turnpike Co.*, 14 Vermt. 311. Where, however, the plaintiff declares on a special agreement, seeking to recover thereon, but fails, he may recover on the general counts, if the case be such

 Edmonds v. Torrence.

that he might have recovered, if there had been no special contract.—*Tuttle v. Mayo*, 7 J. R. 132; *Robertson v. Lynch*, 18 J. R. 451; *Dubois v. Del. & Hudson Canal Co.*, 4 Wendell, 285; *Perrine v. Hankerson*, 6 Halst. 181.

In this case, no recovery could be had independent of the special agreement, disclosed by the evidence. The defendant's liability, if existing at all, depended wholly upon said agreement, consequently, if the special agreement, it had been unsealed, the plaintiff could only recover on a count framed on the agreement, and not on the common counts. For these reasons the evidence offered by the plaintiff, and objected to by the defendant, was properly excluded. Whether the court below excluded it for a right or a wrong reason, need not be decided.

Let the non-suit stand. The judgment is affirmed, and the appellant will pay the costs of the appeal in this court and in the court below.

EDMONDS vs. TORRENCE.

[BILL TO ENFORCE VENDOR'S LIEN.]

1. *Vendor's lien; when exists, and by whom may be enforced.*—A vendor who sells real estate and takes a promissory note for the payment of the purchase-money, and gives the vendee a bond for titles when the note is paid, has a lien on such real estate to secure the payment of the note, and if the vendor endorses the note to a third person the lien is transferred to the indorsee, and he may enforce the same in equity in his own name.
2. *Purchaser from one holding bond for title; chargeable with notice of what.*—A party who buys the estate of such a vendee, and takes an assignment of the bond for titles, as the evidence of his purchase, is charged with notice that the purchase-money is unpaid, and is a lien on the estate. He will not be regarded as a *bona fide* purchaser for valuable consideration without notice.
3. *Principles applied to case at bar.*—D. sold land to F., giving him a bond

Edmonds v. Torrence.

binding D. to make title when two notes, the amount and date of payment of which were recited in the bond, should be paid. D. transferred and endorsed the first of these notes to T. for valuable consideration. After both notes fell due F. sold to E., transferring to him D.'s bond for title, and reciting in the transfer that E. retained enough of the purchase-money to pay that due D. E. paid D. the last note, all the purchase-money claimed by him, and paid H., who had the legal title to the land, the amount claimed by H. of F. By consent of D. and F., H. then made E. a deed to the land, and T., without having sued either F. or D. on the note transferred to T. by D., files his bill against E. D. and F., to subject the land to the satisfaction of the lien of the note held by him. T. had no notice of the sale to E. until it was consummated. E. had no notice of the trade between T. and D.—*Held*, that E. was not a *bona fide* purchaser for a valuable consideration, and without notice, and that the chancellor rightly held the land, subject to the satisfaction of the lien of note made by F., and transferred by D. to T., in the hands of T.

APPEAL from the chancery court of Macon.

Heard before Hon. B. B. McCRAW.

This was a bill in equity, filed by appellee against Edmonds, Daniel and Foster, to enforce a vendor's lien. Daniel and Foster refusing to join in the appeal, were severed, and the appeal prosecuted in the name of Edmonds alone.

The facts, as gathered from the bill, exhibits, answer of Edmonds and admissions of counsel, are as follows: On 9th of January, 1858, Daniel sold the house and lot described in the bill, to Foster, executed a bond for titles, and took from Foster, for the purchase-money, two notes for \$1,900 each, due respectively on the 1st day of January, in the years 1860 and 1861, with interest from date. The first note, which, at the date of the filing of the bill, remained unpaid, and stated on its face that it was given for the first installment of the purchase-money of the premises described in the bill. It was transferred and endorsed by Daniel for a valuable consideration, to the appellee, while Foster was in possession of the lands; one of the inducements offered by Daniel to the purchase of the note being that it constituted a lien on the land. Afterwards, and on the 29th day of June, A. D. 1863, Foster, who was then

in possession, sold the premises to appellant, and transferred to him Daniel's bond for title. This bond for titles recites that Foster had bought the house and lot from Daniel and given his two promissory notes for the purchase-money, each for \$1,900, with the dates of payment as stated before, and that he transferred it to Edmonds and authorized Daniel to make him title, and that Edmonds retained \$2,100 of the purchase-money to pay the amount due Daniel. The bill charges that Edmonds had notice of the existence of the lien of said note and its non-payment, and after making proper parties defendant, prays that the house and lot may be sold for the satisfaction of said lien, &c., &c.

Edmonds sets up that he was a *bona fide* purchaser, for a valuable consideration, without notice, &c. His answer states that "at the time he contracted with Foster for the purchase of the house and lot, the legal title was in one Wm. Hora, who claimed that said Foster was indebted to him, and he would not consent to execute a conveyance until said indebtedness was paid, and said Foster authorized defendant to pay him out of the purchase-money. Defendant was also informed that Daniel held a note which had a lien on said house and lot, and that the said note was all of the outstanding and unpaid purchase-money. To pay the indebtedness to Hora and the note to Daniel, defendant retained \$2,100 of the purchase-money. Afterwards defendant paid Hora, and Daniel came from Eufaula, where he was residing, to Tuskegee, when defendant paid him the amount due on said note, and by consent and authority of both Daniel and Foster, Hora executed to defendant a deed. Nothing was said or done, either at the time of said purchase or at the time the defendant paid the said Daniel, or at any time before defendant had fully paid for said house and lot, and the deed therefor had been executed by said Hora, calculated to put defendant on inquiry as to any of the purchase-money being unpaid, or that there was any note given for the purchase-money, outstanding and unpaid, other than the note held

by Daniel, which this defendant paid. On the contrary, defendant, by himself and through his attorney, inquired if there were any liens whatever upon said house and lot, and were informed that there were none except said note held by Daniel. And said Daniel, at the time defendant paid him the amount due on said note, did not claim or assert that any other part of the purchase-money was unpaid."

Decrees *pro confesso* were taken against Daniel and Foster.

In the admissions of the solicitors, it is agreed that no suit was ever brought against Foster, or Daniel as endorser, on the note whose lien is here sought to be enforced; "that complainant had no knowledge of the sale of the house and lot to Edmonds until the same was consummated; that after Edmonds purchased the lot from Foster, he (Edmonds) procured a deed to be made him by Hora, with the knowledge of and without objection of said Daniel; that Daniel was present at the time the transfer of his bond for title to Foster was made to Edmonds, and received from him payment of the second note described in the bond for titles, and consented that Hora, who held the legal title, should convey to Edmonds; that Edmonds knew nothing of the trade between Daniel and appellee, Torrence." The agreement then concludes, that "it is expressly understood that complainant does not intend, by joining in these admissions, to secure to Edmonds the benefit of his answer as evidence, but on the contrary, complainant expressly objects to its being received as evidence. It is also understood that Edmonds makes no admission of notice that said note was outstanding, &c."

The cause was submitted for final decree on bill and exhibits, decrees *pro confesso*, answer of Edmonds, and the written admissions of the solicitors of appellee and Edmonds.

The chancellor decreed that the note constituted a lien on the land, and after ascertaining the amount due thereon,

ordered it paid within a reasonable time, in default of which the land was to be sold, &c., and hence this appeal.

CLOPTON and FERGUSON, for appellant.—An innocent purchaser, without notice, is always protected against a latent, or an implied trust.—1 Story's Equ. Juris., §§ 409, 1228. The lien of a vendor for the unpaid purchase-money is such a trust.—2 Story Equ. Juris., §§ 1217–19. This lien is in favor of the *vendor*, and, if a bond for titles is given, this bond is notice that the purchase-money is unpaid; but it is not notice that either of two notes given for the purchase-money and described in the bond, has been transferred to a third person. When, then, the vendor himself is present, and produces only one of two notes described in the bond, and that the note last due, and the vendor claims from the sub-purchaser the payment of that note and no more, and, upon the payment of that amount consents and authorizes the legal title to be conveyed to the sub-purchaser, then the sub-purchaser has done all which the notice given by the bond for titles required of him, or charged him with. The notes described in the bond being payable to Daniel, the vendor, the presumption was that he still held all that were unpaid; and the burden is upon the complainant to prove that Edmonds, the sub-purchaser, had notice of the transfer of one of them to him.

If Foster, the maker of the notes, had paid both notes to Daniel, his vendor, and Torrence, the transferee, had sought to hold Foster liable upon the note transferred to him, the burden would have been upon him to prove Foster had notice of the transfer to him, otherwise the payment to Daniel would be good. Then, also, the payment by Edmonds, the sub-purchaser, to Daniel, without notice of the transfer to Torrence by authority of Foster, would have been equally good. The assignment of the bond for titles shows that Edmonds was enquiring about the unpaid purchase-money, and all the notice he had was of unpaid purchase-money due to Daniel, and he paid all that Daniel claimed as unpaid, or that he had notice was unpaid.

The bond for titles not charging him with notice of any transfer of one of the notes, but only of purchase-money due and unpaid to Daniel, the vendor, the first note in the bond having been long past due, and therefore presumed to be paid, more especially as only the last note described in the bond was produced and claimed as unpaid, and, having applied to the only persons to whom the notice given by the bond for titles required him to apply—that is, the vendor and vendee—and no notice having been given of the transfer of the first note, or that it was outstanding, Edmonds is a purchaser for a valuable consideration without notice, and has an equity equal to that of the complainant, and, having also obtained the legal title, the equity and legal title of the appellant must prevail over the mere equity of the appellee.—Story Equ. Juris. § 64, c. Such person, it is said, is a favorite in the eyes of courts of equity.—1 Story Equ. Juris. § 434; *Houston v. Stanton*, 11 Ala. 412.

In *Hall v. Click*, 5 Ala. 363, it was held that an assignee of the note given for the purchase-money of land, could not enforce the equitable lien of the vendor, when the note was assigned by the vendor without recourse, on the ground that the note, having been passed off without recourse on the vendor, the equitable lien did not follow the transfer.

In *Roper v. McCook et al.*, 7 Ala. 318, it was held, however, that where a note given for the purchase-money of land was endorsed by the vendor, the assignee did not lose his equitable lien, because he neglected to sue the maker to fix the liability of the endorser; but this decision was upon the ground that the endorser, who was the vendor, by a voluntary payment might again become the proprietor of the note, and assert the lien in his own name.

From these decisions it follows that an assignee of a note given for the purchase-money of land, can enforce the equitable lien, because he is substituted to the equitable of lien of the vendor, as was remarked in *Roper v. McCook et al.*, *supra*. The assignee claims under and

through the vendor ; and hence, as was decided in *Coster's Executors v. Bank of Georgia et als.*, 24 Ala. 37, the assignee can not stand in a higher or better position than the original vendor occupied. Whenever, then, the original vendor can not assert an equitable lien in his own name, the assignee of the note can not, particularly when the note is endorsed by the vendor, and released from said endorsement by the failure of the assignee to sue the maker. It is too clear for argument that Daniel, the vendor, could not, by a voluntary payment of Torrence's note, enforce the lien against Edmonds. Neither can Torrence, without proving that Edmonds had notice of the transfer of the note to him.

N. S. GRAHAM, and J. E. COBB, *contra*.—The complainant, Torrence, being the owner of the lien note, which is the foundation of this cause, can enforce the lien.—*Wells v. Morrow*, 38 Ala. 125; *Magruder v. Campbell*, 40 Ala. R. 611.

Failure to sue at law, does not affect the right to enforce the lien in equity.—*Haley et al. v. Bennett*, 5 Porter, 453; *Roper v. McCook & Robertson's Adm'r*, 7 Ala. 319.

That Torrence's lien was subsisting and perfect, so long as Foster held the land, can not be doubted. Foster had no legal title, but a bond only ; and "one claiming by purchase from a person who has nothing more than a bond for title, will stand in the same situation as his vendor did, and will be subjected to the same equities in favor of the original vendor."—*Fenno v. Sayre & Converse*, 3 Ala. 458; *Bradford v. Harper et al.*, 25 Ala. 337. And, further, "a vendee of land must examine the titles of his vendor, and is charged with notice of every fact which such examination would disclose."—*Witter, pro ami, v. Dudley*, 42 Ala. 617. In this case, an examination of the bond, the only muniment of title which Edmonds received from his vendor, would have disclosed the existence of the note sued on, since it is clearly and distinctly set out in the bond ; and, being advised of the existence of the note, Edmonds

is charged with notice of its lien, and whether or not it had been paid.

The rule which protects *bona fide* purchasers, does not apply to purchasers of merely equitable titles.—2 Story's Equity Jur. § 1502; 7 Ala. 751.

Foster was a trustee for Torrence, which fact Edmonds was bound to know, and "a purchaser from a trustee purchases at his peril."—Sugden on Vendors, chapter 4, page 211; *Green v. Slayter*, 4 Johns. Ch. R. 46; *Murray v. Bal-lou*, 1 John's Ch. R. 574.

Had Daniel held the note, the foundation of this cause, at the time of the transfer of the bond for title to Edmonds, the lien would not have been lost, because Edmonds made no inquiry, and the relation between Daniel and Edmonds was not such as to impose upon the former the obligation of imparting information not asked for.

In other words, the mere presence of Daniel, and his consent that legal title be made to Edmonds, does not, without more, relieve Edmonds of the necessity to make inquiry. There was nothing in the conduct of Daniel inconsistent with the idea that the lien of the first note was to continue.

But, it is submitted, that the conduct of Daniel, whatever it may have been, could not affect Torrence's lien—that is, the conduct of Daniel *after* he had sold the note to Torrence.—*Rowland v. Day*, 17 Ala. 681.

From all the facts, Torrence had the superior equity, and hence the acquisition of the legal title by Edmonds can not benefit him.

PECK, C. J.—1. From the admissions contained in the record, it is very clear the promissory note for \$1,900, made an exhibit to the bill, was, in the hands of the defendant, Daniel, a lien upon the real estate sold by him to the defendant, Foster, consisting of a house and lot, in the town of Tuskegee, Macon county; and it is equally clear that the endorsement of said note by said Daniel, to the complainant, transferred said lien to him, and as the in-

Edmonds v. Torrence.

dorsee of said note, he may enforce the said lien, in equity, in his own name.—*Wells v. Morrow*, 38 Ala. 125; *Kelly v. Payne*, 18 Ala. 371; and *Connor et al. v. Banks*, same vol. 42.

2. The subsequent sale of said real estate, by said Foster, to the appellant, will not defeat said lien, unless he shows that he was a *bonu fide* purchaser for valuable consideration, without notice. The appellant, at the time of his purchase, knew that Foster bought the said premises of the defendant, Daniel, and that he had given his notes to secure the payment of the purchase-money, and only held Daniel's bond for titles, when the said notes should be fully paid. This he knew, because, as the only evidence of his purchase, he received from Foster said bond with his assignment on the same, in the words and figures following, to-wit: "For and in consideration of the sum of "fifty-five hundred dollars, I, Benjamin F. Foster, do "hereby transfer, assign and set over unto William Edmonds, the foregoing bond for title, and authorize James "L. Daniel to make titles to said William Edmonds. "Thirty-four hundred dollars of said money paid me in "cash, and twenty-one hundred dollars retained by said "Edmonds, to pay balance of purchase-money due said "James L. Daniel. Witness my hand and seal, June 29, "1863."

(Signed)

BENJ. F. FOSTER, [seal.]

The said bond is made an exhibit to the complainant's bill, and its condition shows that Foster bought said property of said Daniel, and gave his two notes for the purchase-money, each for the sum of \$1,900, one payable the first day of January, 1860, the other payable the first day of January, 1861; and it is admitted the first of said notes was endorsed to the complainant, before the appellant purchased the said premises of said Foster, and is the note made an exhibit to the bill of complaint. This was notice to the appellant that Foster bought the said premises of Daniel on a credit, and that said note was given to secure, in part, the payment of the purchase-money, and, if not

paid, was, at the time of his purchase of Foster, a lien upon the property so purchased, and although past due, he was bound, at his peril, to inquire, and to determine, for himself, whether the same had been, in fact, paid. This knowledge, on his part, was sufficient to destroy his claim, to be regarded as a *bona fide* purchaser, for valuable consideration without notice.—*Bradford v. Harper et al.*, 25 Ala. 337; *Newsome et al. v. Collins*, 43 Ala. 656.

There is no evidence in the record, that the appellant made any inquiry on this subject. This was his fault, and he must take the consequences of his negligence. The answer was not evidence for the appellant; it is not on oath, but if it was, it fails to establish the defense, upon which he relies to defeat the complainant's equity; that he was a *bona fide* purchaser, for valuable consideration without notice. The answer states that appellant was informed, at the time of his purchase, that said Daniel held a note, which was a lien on said house and lot, and that said note was all the purchase-money outstanding and unpaid, but it does not state how or by whom he was so informed, or that he made any inquiry as to the truth of said information.

The answer further states that, neither at the time of said purchase, nor at the time he paid said Daniel, or at any time before the appellant had fully paid for said house and lot, and the execution of the deed to him, by William Hora, nothing was said or done calculated to put him on inquiry, as to any of the purchase-money being unpaid, or that there was any note given for the purchase-money, outstanding and unpaid, other than the note held by said Daniel, which was paid by him out of the money agreed to be paid to said Foster, retained by him for that purpose; that, on the contrary, he, by himself, and through his attorney, inquired if there were any liens, whatever, upon said house and lot. Now, all this is very inconclusively and very cautiously said, and fails to show that the appellant acted even with common-prudence in this matter. It is not stated of whom inquiry was made, or what

Smith et al. v. Ivey.

was the answer to said inquiries. If the appellant had inquired of said Foster, he could have told him the first of said notes, the one indorsed to complainant, was not wholly paid, and if he had inquired of said Daniel, he would have informed him, the said note had been indorsed to complainant. Common prudence and ordinary diligence would, it seems to us, have suggested the propriety and necessity of making these inquiries, and if they had been made, they would have saved the appellant from the trouble, into which he seems to have fallen, and as it is the result of a want of proper care and caution on his part, he must suffer the consequences of his own negligence.

The chancellor held that the complainant was entitled to the relief prayed, and decreed that said note was a lien upon said house and lot, and after ascertaining the sum due on it, ordered the same to be paid, within a time named, and in default of payment, the register should sell the premises, &c. This decree, we think, free from error, and it must be affirmed at the appellant's cost.

SMITH ET AL. vs. IVEY.

[APPLICATION TO PROBATE COURT TO SUBSTITUTE RECORD OF DEED DESTROYED
BY FIRE.]

1. *Courts, proceedings of, during the war; may be substituted.*—The lost records of deeds and other proceedings of the courts, in this State, made during the late war, may be established and substituted under the act of the general assembly, entitled "an act to authorize the substitution of lost records of judgments, and decrees of courts, and other records," approved January 18, 1866.—(Pamph. Acts 1865, 1866, p. 48, Act No. 18.)

APPEAL from Probate Court of Conecuh.

Tried before Hon. A. W. JONES.

The facts are sufficiently stated in the opinion.

MARTIN & SAYRE, for appellant.—Recording the deed could not possibly aid “rebellion,” or harm the United States. It falls within those acts which all civilized nations uphold, even when done by conquered enemies, in the interest of peace and good order. The necessity ought to be strong which would make the court organize anarchy by deciding that no man in Alabama, during the war, had authority to record a deed. If there was no judge who could record a deed, there was none who could lawfully do any thing else.

For aught that appears in the petition, the probate judge who recorded the deed, may have held over under a new election, and not entered into the war, when even under *Clisholm v. Coleman*, 43 Ala. 204, the probate judge would have been competent.

S. J. CUMMING, *contra*.—What the appellants call a record of the deed, was made and done in 1864, and by a person who signs the certificate of record, as judge of probate of Conecuh county at that time.

This court having decided that there were no legal court in Alabama, and no legal judges, during the Confederacy, it follows that there was no legal record of the deed ever made.

There being no legal record of court, it could not be substituted under this statutory proceeding. The statute only applies to legal records, made in legal courts, by legal judges.

PETERS, J.—This is a proceeding in the court of probate of Conecuh county to substitute the record of a deed, alleged to have been destroyed, under the provisions of the act of the general assembly of this State, entitled “an act to authorize the substitution of lost records of judgments and decrees of courts, and other records,” approved January 18, 1866.—(Pamph. Acts, 1865, 1866, p. 48, Act No. 18.) It is alleged in the notice of the application, that the deed was “received for record and recorded” on the 29th

day of September, 1864, by "John M. Henderson, judge." The notice was otherwise sufficiently regular and avers all the facts necessary to give jurisdiction. There was a demurrer to the notice, and three principal causes of demurrer were assigned; but as they all raise the same question in different forms, only the first will be set out and discussed. It is in these words: "1. There was no lawful probate court in the county of Conecuh, Alabama, at the time said petition (notice) alleges that said deed was recorded." This demurrer was sustained by the court below, and the application was dismissed with costs. From this judgment the petitioners in the court below, who are the appellants in this court, bring the case here by appeal.—(Pamph. Acts 1865, 1866, p. 48, Act No. 18, § 4.)

A demurrer admits all the facts properly stated in the pleading objected to.—(1 Chitt. Pl. p. 661, 662, and Notes, 4th Amer. Ed. by Perkins.) Then, it is admitted in this case, that the deed in controversy "was probated and recorded in the office of the judge of probate of said county, (Conecuh,) by the then judge of said probate court, (of Conecuh county,) on the 29th day of September, A. D., 1864;" and that since said record was so made, "all the records of the probate court of said county of Conecuh were destroyed by fire, on or about the 10th day of November, 1866, including the records of wills and deeds of said probate court." The question then raised by the demurrer in this case is this: Did the general assembly, in the act above referred to, intend to include such a record as the one mentioned in the notice in this cause? I think it did. The language of the act very clearly shows this. It is in these words:

"SEC. 5. *Be it further enacted*, That in case of the loss or destruction of the records of decrees, deeds and other papers, *required by the laws of this State to be recorded*, in the office of the courts of probate, the judge of such court shall have the same authority as is conferred in the preceding sections upon the circuit and chancery courts to establish and substitute such records of deeds, decrees and

other papers; and all papers and deeds which may have been recorded in his office according to law, the record of which has been lost or destroyed, may be recorded anew, upon which said record said judge of probate shall also enter all such indorsements or certificates as may have been attached to said papers or deeds by the former presiding officer; and said records, when so made, shall have the same force and effect as the original records, which were lost or destroyed. And for the services herein directed, the probate judge shall receive such compensation, and which shall be paid in such manner as the court of county commissioners may allow and direct."—Pamph. Acts 1865, 1866, p. 48, 49, § 5, Act No. 18.)

The language of the act above quoted is quite broad enough to include the deed involved in this case, as in any other. It was an instrument required to be recorded in the office of the court of probate. It was so recorded and the record, such as it was, was destroyed. Such a proceeding was not necessarily a nullity. It has not been so declared by this court, or by any branch of the State government.—(*Martin v. Hewett*, 44 Ala. 418.) This case is not like that of *Chisholm, Comptroller, v. Coleman*, 43 Ala. 204. In this latter case, the facts alleged in the petition, admitted the incompetency of the officer claiming to be judge. Here, the allegation is the other way. The cases, then, are not the same in fact, or in principle. Besides, the legislature evidently saw the necessity of protecting and perpetuating the records of the rebel courts, so far as this could be done, to the same extent as if they had been legal tribunals. The language used by them certainly goes to this extent, and we feel that it is necessary and proper, as a remedial statute, to give it that construction. *Ubi lex specialis, et ratio ejus generalis, generaliter est accipienda.* (2 Just. 43, 83; Dwarrris, 735, 711; *The Mayor, &c., of New York v. Lord*, 18 Wend. 131; *Thompson v. The State*, 20 Ala. 54; *United States v. Babbet*, 1 Black. 61; *Gelpcke v. Dubuque*, 1 Wall. 220; also, *Shiver's Ex'r v. Shiver, et al.*

The judgment of the court below is reversed and the

Ray v. Wragg et al.

cause is remanded for further proceedings in that court in conformity with this opinion. The appellee will pay the costs of this appeal in this court and in the court below.

RAY *vs.* WRAGG ET AL.

[BILL IN EQUITY TO FORECLOSE MORTGAGE.]

1. *Mortgage; language in case at bar; to what held not to apply.*—A mortgage of lands which conveys the property generally, and in the conditional part empowers the mortgagee “to take possession of said property, reserving alone the amount of land which the law exempts as a homestead,” and the same to sell, &c., does not convey the homestead nor authorize a decree of foreclosure against it.
2. *Homestead; how set apart.*—The quantity and value of the land to be set apart should be ascertained from §§ 2880, 2884 of the Revised Code, notwithstanding the mortgagor had become bankrupt, and had purchased the property, subject to the mortgage at sale by his assignee in bankruptcy.

APPEAL from chancery court of Lowndes.

Heard before Hon. ADAM C. FELDER.

The bill was filed by the appellees to foreclose a mortgage of lands. It charged that on default of payment of the debts secured, the mortgagee was to take possession of the property conveyed, “except alone that which the law exempted as a homestead, and to sell the same,” &c. The mortgage was attached to the bill as an exhibit, and made a part of it. It further charged that the mortgagor, the appellant, became bankrupt after the execution of the mortgage, and at his assignee’s sale of the property, purchased it, subject to the rights of the mortgagee.

The mortgage describes and conveys the property in the usual manner, with the additional description, that it is “the premises whereon the said A. J. Ray (the mortgagor) now lives.” It further recites that on the failure of the

Ray v. Wragg et al.

mortgagor to pay the debts secured at maturity, the said mortgagee "shall have the power to take possession of the said property, reserving alone the amount of land which the law exempts as a homestead, and the same may sell," &c. A decree *pro confesso* was taken against the mortgagee, and afterwards a final decree was rendered, subjecting all of the land to the payment of the debts, without any reservation of the homestead, and ordering its sale. The sale was made, and was confirmed, and the sheriff directed to deliver the possession to the purchasers, and hence this appeal.

SAMUEL F. RICE, and JAMES BUELL, for appellant.

WATTS & TROY, *contra*.

B. F. SAFFOLD, J.—In construing contracts the intention of the parties will be carried into effect, so far as the rules of language and the rules of law will permit. A court would not, by construction of a contract, defeat the express stipulations of the parties. It is a rule that the whole contract should be considered in determining the meaning of any or of all its parts. Where one contract is contained in several instruments, the court will read them in such order of time and priority as will carry into effect the intention of the parties, as the same may be gathered from all the instruments taken together.—Parsons on Contracts, Vol. 2, p. 11, 15; *Barton v. Fitzgerald*, 15 East, 541, *Browning v. Wright*, 2 B. & P. 13.

It is plain that the mortgage was not intended to cover the homestead of the mortgagor. The proceedings in bankruptcy have no connection with this case. The mortgagee claims and can claim, in this suit, no other or greater interest than is given him by his contract. The homestead was not mortgaged. It is not liable to the debt, and therefore no decree can be rendered, foreclosing the appellant's right to it. It should have been especially excepted out of the decree, and the register should have been instructed to have it set off to the claimant under the regulations pre-

Mobile County v. Hagan et al.

scribed for sheriffs in similar cases. The quantity and value of the homestead will be ascertained from sections 2880 and 2884 of the Revised Code.

The decree is reversed and the cause remanded.

MOBILE COUNTY vs. HAGAN ET AL.

[ACTION TO RECOVER RENT.]

1. *Lease, contract of; construed.* —In a contract of lease for three years, from November 1, 1864, for \$4,500 a year, payable quarterly, in such currency as the banks in Mobile usually received and paid out at the time, the lessee was authorized to put the property, much out of repair, into tenantable order, the cost of the repairs to be deducted from the rent as it fell due. On the 19th January, 1865, the lessors acknowledged, in writing, an account of \$6,830 for the repairs to be "a credit, that is to say, so much paid on the rent of the building leased." The lease terminated by consent May 3, 1866,—*Held*, in a suit by the lessors to recover rent from May 1, 1865, to May 3, 1866, that the lessee was not indebted. The change of currency in the spring of 1865, from Confederate to U. S. treasury notes, could have no effect to reduce the claim for repairs previously estimated and credited on the rent.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

This was an action brought by the appellees against the appellant, to recover the sum of \$4,462, alleged to be due from May 1st, 1865, to May 1st, 1866, for rent of a building in Mobile, which appellees, on the 19th of September, 1864, leased to appellant, for use as a court-house for a term of three years, commencing November 1st, 1864.

The contract of lease recites that the rent to be paid was payable quarterly; "that is to say, at the rate of four thousand five hundred dollars annually, and payable quarterly, and the said party of the second part doth agree to

use said premises in a tenant-like manner for the purpose aforesaid. And it is further agreed that if, at the end of said term, the county of Mobile shall need a further occupation of said building, for the purpose aforesaid, said party shall have the privilege to renew the said lease annually from year to year on the same terms, so often as necessity shall require, not to exceed ten years in all, from and after the first of November next, provided that two months, notice shall be previously given of each annual renewal, the said rents to be paid in such money and currency as shall be current at the times when respectively due—that is to say, in such currency, or money, as shall be at the time usually received and paid out by the banks in Mobile—and at the end of said occupation by the county of Mobile the said premises shall be yielded and surrendered, with all repairs and improvements, to the said parties of the first part, in the same order as received, reasonable use, wear and tear excepted.”

The lease concludes as follows: “And it is further agreed between the parties, that inasmuch as said premises are now out of repairs, that the said parties of the second part shall, during the term of said lease, have power and authority to cause said building to be put in tenantable repair, so that it be made weather-proof and in good condition of safety, and that said repairs shall be such as shall be needed and practicable, and to a reasonable and proper extent, which is left to the discretion and good judgment of said county commissioners; and the said building in like manner shall be kept in repair during its occupation for the purpose aforesaid, all which repairs so to be made shall be made under the authority and order of said commissioners, and paid for by the county of Mobile, and the amount thereof shall be deducted from the rents accruing as they shall fall due, all which is agreed by said parties, so that said building be made tenantable and fit and safe for the use of the county as aforesaid.”

On the 20th day of September, 1864, the day after the execution of the lease, the following stipulation was added

Mobile County v. Hagan et al.

to the contract: "It is understood between the parties to the within lease, that in case of destruction of the property by fire or elements beyond the control of the parties, or by the public enemy, so that the same can not be used for the purposes of the county; in such case the lease and rent shall cease."

On the 19th day of January, A. D. 1865, George N. Stewart, (who was fully authorized,) in behalf of himself and other lessees, signed the following writing: "The account of repairs made on the building leased as above to the county of Mobile, has been this day rendered, amounting to the sum of six thousand eight hundred and thirty dollars, which sum is, therefore, a credit—that is to say, so much paid on the rent of the building above leased.

Mobile, January 19, 1865.

(Signed)

GEORGE N. STEWART,

For self and other owners."

This instrument was written by Stewart, at the request of the president of the commissioners court, upon presentation by the latter of the account for repairs, on a duplicate copy of the contract of lease. Stewart knew at the time that the repairs had been paid for in Confederate currency. The repairs were necessary, and made in pursuance of the contract, costing \$6,830, which was paid by the county in Confederate money, that sum being a reasonable amount in that kind of currency. It was agreed at the time the lease was made that the necessary repairs were to be estimated and paid for in the currency in use at the time the repairs were made.

At the time the contract of lease was entered into, up to the 12th of April, 1865, the currency in use at Mobile, and which was received and paid out by the banks, was Confederate money, which was greatly depreciated. At the date of the repairs, and the execution of the receipt, \$35 in Confederate money was required to purchase one dollar in gold.

On the 12th day of April, 1865, the United States troops

took possession of Mobile. Confederate money immediately became valueless, and thereafter the currency which was paid out and received by the banks in Mobile was United States Treasury notes, and National Bank notes, commonly called "green-backs."

It was admitted, subject to an objection to its relevancy, that the building and premises leased, in their condition as improved and repaired by defendant, could not have been rented out by plaintiffs, if they had had control of them, for a year from the 12th of April, 1865, for more than \$1,500 or \$2,000 in United States currency, and that in the condition in which the buildings were before the repairs, plaintiffs could not have rented them out from April 12th, 1865, to May 3d, 1866, for more than five hundred dollars.

At the time the building was sold, no mention was made of the rent here sued for, but shortly afterwards a claim therefor was presented to the commissioners' court, and by it disallowed.

The cause was submitted to the court, without the intervention of a jury, upon an agreed statement of facts, the substance of which has been given above. The court rendered judgment in favor of plaintiff for the amount sued for, and hence they appeal.

C. W. RAPIER, for appellant.—Now, by reverting to the situation of the parties at the date of the contract, to the condition of the country and the character of the currency at that time, and to other circumstances of the transaction, what are we to believe was meant by the stipulation in the contract, that the amount of repairs, when paid for by the county, should be deducted from the rents accruing as they should fall due? Is it not plain to every reasonable and unbiased mind that the cost of repairs made pursuant to the contract, and paid by the county in the currency in use at the time, was, by the understanding of the parties, to extinguish *pro tanto*, and dollar for dollar, the rents accruing? The language of the contract and all

the surroundings of the transaction point to this conclusion.

As to rules of construction see 2 Ala. 434; 19 Ala. 149; 22 Ala. 438; 39 Ala. 461.

To give to the contract the effect contended for by the appellees, we should have to sustain to the letter, that part of it which favors the lessors, and almost entirely ignore that part of it which favors the lessee. Or we should, on the basis of implication, have to engraft upon the contract complicated provisos and conditions, which would, to a great extent, destroy the force of the provisions for the deduction of repairs from the rents. This would not be in consonance with the recognized rules of interpretation. "The exposition," says Mr. Chief Justice Collier, "must be upon the whole instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words, and such exposition shall be made, if practicable, as will give efficiency to every clause."—2 Ala. 434.

It has been said by a learned judge, that "in expounding a contract, extraneous matter explanatory of it, may be resorted to."—2 Ala. 477. If so, then the receipt above set out, goes far to show the original understanding of the parties. It was given soon after the contract was entered into, and before any change of currency or of government had taken place. Both parties, at the time of the receipt, understood that the amount of repairs would extinguish or pay, *pro tanto*, the accruing rents. Nor is there room to suppose that any mistake or inadvertence in the receipt prejudicial to the lessors, could have taken place, or that any misapprehension, at that time, of the meaning of the contract, could have occurred, for the same eminent counsel who drew and signed the contract, also wrote and signed the receipt.

If any question be raised as to the validity of the contract, because Confederate money entered into the consideration of it, such question is answered by the decisions here referred to.—41 Ala. 423; *ib.* 548; 43 Ala. 547; 8 Wal. 1.

The receipt or acknowledgment not only serves to illustrate the meaning of the contract, but it shows an acceptance of the amount of the repairs as payment, *pro tanto*, of the rents. There is no pretence of misrepresentation, or fraud, or mistake, in connection with the receipt. When such is the case, the acceptance of money or other thing in payment, is binding upon the party receiving it, and the receipt necessarily operates as an estoppel.—2 Porter, 280; 9 Porter, 150; 27 Ala. 254; 44 Ala. 242.

If the equities of this case are to be looked to, then the equities on the side of the lessee, as well as those on the side of the lessors, should be considered. It is apparent from the record that the building was greatly out of repair; that it was, in a manner, worthless for occupation without extensive repairs; that the rents agreed upon were high, because of the depreciation of the currency then in use; that the building, after the war, with the improvements which had been put upon it by the county, could not have been rented for a year, from the 12th of April, 1865, for more than \$1,500 or \$2,000, and without such improvements, for not more than \$500 in U. S. currency; yet the lessors seek to recover, for that time, \$4,500.

But the lessors can not recover, upon equitable considerations, independently of the contract. The third section of ordinance 26, adopted by the convention of 1865, (Revised Code, 59,) does not authorize any recovery, not justified by the contract. If it did, it would be void under section 10, article I, of the federal constitution. The section of the ordinance referred to, restricts the right of recovery to the contract. It provides, that the plaintiff may show what he is "legally, justly and equitably entitled to receive, *according to the contract.*"

In this case, the parties must stand or fall by the contract, however unwise or unprofitable, on one side or the other, it may have turned out to be.—*Kirtland v. Molton*, 41 Ala. p. 563.

GEORGE N. STEWART, *contra*.—The endeavor of appellants is to make the receipt, given on the 19th of January,

1865, play the part of a supplemental contract. But it is not a contract. It is but an acknowledgment or evidence of a pre-existing fact, which existed, and could be established as fully by evidence without the receipt as with it. It was but a convenient mode of evidence to establish what amount had been paid under the original contract in Confederate currency. The legal effect of that disbursement, made under the terms of the contract, was precisely the same before as after the receipt, the rights of the parties not being changed by it in any respect.

The test between receipts simply, and receipts which operate as contracts, is very clearly drawn by the law. To make a contract, or any agreement to vary a previous contract, which thereby becomes of itself a contract, there must be a new consideration; and clearly here there was no new consideration, and a past one will not be sufficient. As to the effect of the receipt, see *McKeagg v. Callahan*, 13 Ala. 828.

The case, then, beyond any doubt, stands upon the original contract, and the continued occupation under it, after the change of flag, and the terms of the contract cover the entire case.

The theory of the argument of the appellants, which is, that the adjustment of the amount expended for repairs, was a final settlement and disposal of that sum and transaction, can not be maintained. Rent paid in advance, never can be a final transaction from its very nature. The rights of the parties are not and can not be closed thereby. They must, notwithstanding such payment, be subject to such future events as may transpire, even where there is no stipulation as to the future.

In this very case, there is a stipulation that if the building be destroyed, the rent was to cease. Suppose that the building had been destroyed by fire on the next day after the receipt was given? What would become of the payment then? Must it not be refunded to the lessee? It is clear, then, that the payment was in confidence that the

rights of the parties continued as they were, and that future events might control the case.

So, if the title of the lessor failed, and there was an adverse recovery of the possession from the lessor by a stranger; or suppose the lessee purchased the property, as was actually the case here, would not the rent stop and a refunding of the rent be demandable?

In case of the necessity of such refunding, what would have been the measure of the refunding? If, in Confederate times, the same money would be proper. But suppose the refunding had not been paid till after the change of flag, when Confederate money was worthless, then the proper measure would be the *value* of the currency when received. That would be justice.

The true position of the lessor who receives rent in advance, is that of a trustee, to apply the rent as it falls due, and if not, to return the fund received to the lessee, if the duty to pay rent ceases. The fund provided in advance in this case was proper and sufficient to pay rent in Confederate times, but not to pay the rent as the contract required after the change of flag.

The idea of *acceptance* of that kind of money does not hold here. There was no money paid to the lessee. The contract authorized the county to make repairs at their discretion. They did so, to an excessive amount, and this they paid for in paper of very little value. They made these repairs and payments as their own act. As Confederate money was in circulation then and none other, the implication was that such payments were proper, and that was acceded to. The prices, of course, if measured in "dollars," were most exorbitant, but it was not at all in contemplation that the rent would continue to be payable in the same currency. But the terms of the lease were not overruled by this implication. The parties had expressly stipulated for the case of a change in the currency, and each party was, by express contract, to take the chances of profit or loss, arising out of any change, and the lessors are properly entitled to what they expressly stipulated for.

They had to run the risk of a further depreciation of the value of the currency, if the Confederacy had continued without return to specie payment during the four or *ten* years of the lease, and, consequently, are entitled to the benefits of the change.

Under the claim made, if the lessees had expended the whole amount of the four years rent in depreciated currency, they would wholly overrule and annul an important and controlling part of the contract, which they can not do by their own act.

The receipt was conclusive in one respect. It was an assent to the enormous amount of what is called repairs. The construction should be strict in this respect, and as the payment was the act of the lessee and not made to the lessor, the right of the lessor should not be destroyed by implication.

It is very clear that the lessors and lessees, both, by their contract, intended to exclude all idea of speculation on the rise or fall of money. They provided expressly that the rent should be paid in bankable currency at the expiration of each quarter. Yet here the appellants claim the right of the lessee to gain a great advantage, not stipulated for, by a speculation on the value of the currency, and this by their own act. This principle of speculation on the value of the currency was excluded carefully by the terms of the contract, by stipulation as to the kind of money due at each quarter, and this principle is now sought to be avoided.

Suppose the contract had provided that Confederate money should be paid during the whole term for rent? Would the court enforce such a contract after the change of flag? It is presumed not, yet here this kind of payment is sought to be enforced by construction against the express terms of the contract.

The only issue between the parties in the court below was whether the rent, after the change of flag, was paid or not.

There is in the record evidence, offered by appellant, to

disparage the value of the property. The proof of value was the price agreed to be paid, let the currency be what it might, even gold. Of course, the county would not have agreed to give such price, if the value was so small as pretended.

The case stands on the contract, and the issue is payment *vel non*.

The question can be illustrated thus: Suppose, instead of repairs, the lessees had deposited in the hands of a third person, as a trustee, the sum of \$6,830, in Confederate money, for the purpose of paying the rent quarterly, if the building was not destroyed by fire, as it should fall due, and if no rent did accrue, then to return the money to the lessee. It is clear that the trustee would pay the rent as it fell due, in Confederate currency, but when, by the contract, it fell due in green-backs, he could not do so.

Now, what can be the difference between that case and the case before the court? No distinction in principle can be drawn. The fund remained in abeyance as a trust fund to be paid to the lessor if rent accrued, or to the lessee if no rent ever became due, which was contingent, and depended on the happening of subsequent events, recollecting, always, that the receipt had no operation as a *contract* to change the terms of the original lease.

B. F. SAFFOLD, J.—This case is confused by events which occurred subsequently to the transactions between the parties. If we construe the contract and the writing of January 19, 1865, together, without reference to what transpired afterwards, and apart from the parol evidence, the following propositions are clearly deduced: 1st. The repairs were to be made as speedily as practicable, in order to render the building tenantable, for the purpose designed; and they were to be considerable, costing much more than the rent accrued at the time of their completion. 2d. This cost was not to be a collectible demand against the lessors, but a payment of the rent for the time necessary to absorb it. 3d. The value of the repairs was estimated, agreed

Mobile County v. Hagan et al.

to, and paid on the rent, on the 19th of January, 1865, by the express assent, and concurrence of both parties.

This view of the case is strengthened by the parol evidence, that the building could not have been rented, from the 12th of April, 1865, to the 3d of May, 1866, for more than \$500 in lawful money, in the condition it was at the date of the renting. It is not changed by the provisions of the contract for the payment of the rent quarterly, in the currency in use at the time. Because the lease was for three years, the repairs consumed only about half of it, the compensation being sufficient, under the existing circumstances, ample scope was left for the operation of the provision respecting any change in the currency.

The appellees, in effect, treat the cost of the repairs as an independent claim of the lessee, to be used as an offset. This is not so. It was the manner of the payment of the first rent, so expressed by the contract, and so admitted in the writing.

Ordinance 26, § 3 of 1865, Revised Code, p. 58, is not applicable to this case. Here is not a contract agreed to be discharged by payment in Confederate currency. The obligation of lessee was to pay in repairs, and in currency bankable at the maturity of each installment, whether gold or something else. The value of the repairs was ascertained, consented to, and credited on the rent, by the lessors themselves, or, as they expressed it, "which sum is, therefore, a credit—that is to say, so much paid on the rent of the building above leased."

If the Confederate currency had remained in circulation until the 3d of May, 1866, when the property was sold, the lessors would not have received any money. Why should the fact that, for the greater portion of the time, they became entitled to receive a much more valuable currency, diminish the right which the lessee had previously acquired against them?

The stipulation respecting the cessation of rent, if the building should be destroyed, was a concession in favor of the lessee, to become operative only in the contingency

provided for. It was a condition added to the contract the next day, and can not be presumed to indicate the intention of the parties further than is directly expressed in it.

The judgment is reversed and the cause remanded.

MORGAN *vs.* THE STATE.

[INDICTMENT FOR RAPE.]

1. *Conviction in capital case; what must affirmatively appear to sustain.*—On appeal to this court, in order to sustain a conviction for a capital offense, the record showing that the defendant was in actual confinement, it must appear affirmatively that a copy of the indictment and list of jurors summoned for his trial, were delivered to him one entire day before the day appointed for his trial, as required by § 4171 of the Revised Code.
2. *Motion in arrest of judgment; upon what must be predicated.*—A motion in arrest of judgment can only be predicated on matter of record.
3. *Same; what not ground for.*—That the jury, after being sworn and empanelled, for the trial of one charged with a capital offense, were permitted by the court to separate, and “mix with the crowd attendant on the court,” is not matter for arrest of judgment but for new trial.

APPEAL from the Circuit Court of Calhoun.

Tried before Hon. W. L. WHITLOCK.

The appellant was convicted of rape. He was in actual confinement, but no copy of the indictment or venire were served upon him as required by law, one entire day before the day set for his trial.

Before sentence, he moved in arrest of judgment, and his motion, as well as the proof offered to support it, were made part of the record in the entry overruling the motion.

This entry was as follows: “Comes the defendant, and moves the court to set aside the verdict and to arrest judgment thereon, on the following grounds:

1st. The defendant was in jail on a charge of capital felony, and was not served with a copy of the indictment against him, and a list of jurors to try his cause, one entire day before the day set for his trial.

2d. The jury which tried his case were permitted by the court, after they had been impaneled and sworn, and the State had introduced and examined the greater part, if not all its witnesses, and before the verdict was rendered, to separate and get their dinners and mix with the crowd who were in attendance upon the court, and this was done without the consent of defendant.

3d. The verdict of the jury was contrary to the evidence.

4th. The evidence was too uncertain and unreliable to warrant a conviction.

Upon the hearing of said motion, it was proved to the satisfaction of the court that the facts set forth in the paragraphs, containing the first and second grounds for motion, were true, namely: that no special list of jurors, nor copy of indictment was served upon defendant, (he being at the time confined in jail,) one entire day before the trial of his cause, and that defendant, neither by himself or counsel, demanded a copy of said list and indictment; that the jury which tried his case were permitted by the court to separate and get their dinners and mix with the crowd who were in attendance upon the court; and this after the jury had been impaneled and sworn, and the State had examined the greater part, if not all its witnesses, (and before the verdict was rendered,) and this was done without the consent of defendant.

After argument, and due consideration had thereon by the court, it is ordered by the court that defendant's motion be overruled."

The action of the court below in overruling the motion in arrest of judgment, is now assigned as error.

ELLIS & CALDWELL, for appellant.

JOHN W. A. SANFORD, Attorney General, *contra*.

PETERS, J.—This is an appeal from a judgment of conviction on a prosecution for rape. This offense is a capital crime, as the defendant is subject to the punishment of death.—(Rev. Code, § 3661 ; 1 Bouv. L. Dict., word, *Capital Crime*, p. 240.) The rule of law, fixing the rights of the accused in such a case, is very clearly laid down in the Code. It is this: "If the defendant is indicted for a capital offense, and is in actual confinement, a copy of the indictment, and a list of the jurors summoned for his trial, including the regular jury, *must* be delivered to him at least one entire day before the day appointed for his trial; and if he is unable to employ counsel, the court *must* appoint counsel for him, not exceeding two, who must be allowed access to him at all reasonable hours; and if he is not in actual custody, and has counsel, *whose names* are so entered on the docket, such counsel *must*, on application, be furnished with a copy of the indictment and a list of the jury."—(Rev. Code, § 4171.) This is a plain and peremptory command, and as such it should be enforced by the court. It confers rights as absolute as the right to be tried by a jury, and it should appear in the record of the proceedings in the court below, that they have been equally well guarded. The motion in arrest of judgment is made a part of the record in this case, as well as the action of the court thereon. From this it appears that the defendant was in actual confinement at the time of summoning the jury, and at the time of the trial. When this is the case, the record should show affirmatively that a list of the jurors and a copy of the indictment had been legally delivered to the defendant. If it fails in this, it is error. *Robertson v. The State*, 43 Ala. Rep. 325. In such a case as this, this court looks to the whole record, if this shows error there will be a reversal.—(Revised Code, § 4314.) Strictly speaking, a motion in arrest of judgment can only be founded upon matter of record. The court can not hear extrinsic evidence on such a motion.—*Williamson & Daniel v. Br. Bk. Montgomery*, 3 Ala. 504. Then the court below did not err in denying the motion in

McCuan v. Turrentine, Adm'r, et al.

arrest, but the proceedings in the court below, for the error above pointed out there, must be reversed. The jury, after being impaneled and sworn, should not be permitted to separate and "mix with the crowd, who were in attendance on the court," without the consent of the defendant. But such a departure from the proper practice is not a matter for arrest of judgment, unless, perhaps, it is made a part of the record by bill of exceptions, but is grounds for a new trial.—(*Brister v. The State*, 26 Ala. 107; *Franklin v. The State*, 29 Ala. 14.)

For the error first above pointed out, the judgment of conviction in the court below is reversed and the cause is remanded for a new trial, and the defendant, the said Alexander Morgan, who is the appellant in this court, will be held in custody until discharged by due course of law.

MC CUAN vs. TURRENTINE, ADM'R, ET AL.

[APPLICATION BY WIDOW TO PROBATE COURT TO ALLOT HER AND HER CHILDREN FIVE HUNDRED DOLLARS, THE ESTATE BEING INSOLVENT.]

1. *Insolvency, decree of; what does not annul.*—The omission of creditors to file their claims against an estate duly declared insolvent, can not annul the decree of insolvency.
2. *Dower, claim of by widow; does not destroy right to claim five hundred dollars out of insolvent estate.*—A claim of dower by the widow does not deprive her and the minor children of her husband of the homestead exemption of \$500 worth of land out of his insolvent estate.
3. *Homestead exemption; what does not deprive widow of.*—An administrator, shortly after the death of the intestate, obtained an order for the sale of his lands for the payment of debts, sold them, and had the sale confirmed. Afterwards, but before the payment of the purchase-money, he reported the estate insolvent. A conveyance was subsequently made to the purchaser, and on the final settlement of the insolvent estate a balance was distributed to the heirs, because of the omission of the creditors to file their claims,—*Held*, that the widow and children were not thereby deprived of their homestead exemption of \$500 worth of land.

APPEAL from the Probate Court of Limestone.
Tried before Hon. J. P. COMANS.

The appellant petitioned the probate court to allot her and her minor children five hundred dollars worth of certain described lands which her husband died seized and possessed of, his estate being insolvent. This application was resisted by the administrator, and the purchaser of the said lands at a sale made by said administrator, on the following grounds: 1st. The decedent died in 1866, and on the 14th of January, 1867, the lands were sold by his administrator under an order of the court. 2d. The purchase-money had been paid and the sale confirmed in March, 1867, and a conveyance to the purchaser executed in April, 1869. 3d. The estate of the said decedent was reported insolvent shortly after the sale, and was declared insolvent in August, 1867, but on the final settlement a balance was distributed to the heirs on account of the failure of the creditors to file their claims, or, as the record expresses it, "that this estate was insolvent, but became solvent by reason of the creditors, save one, failing to come forward and file their claims as prescribed by law." It further appears from the transcript, that the lands sold for \$440, and that the balance distributed to the heirs was \$14.63. The decree of final settlement and distribution was rendered in January, 1870, and the appellant's petition for homestead was filed December 9, 1870. The appeal is taken from the judgment of the court dismissing the application.

WALKER & JONES, for appellant.
J. M. MALONE, *contra*.

B. F. SAFFOLD, J.—Section 2061 of the Revised Code exempts from the payment of the debts of a decedent five hundred dollars' worth of his real estate for the benefit of his family, when it consists of a widow or child or children under twenty-one years of age, whether his estate is insolvent or not. The sixth subdivision directs that when the

McCuan v. Turrentine, Adm'r, et al.

estate is insolvent, and it becomes necessary to sell the real estate for the payment of debts, three appraisers appointed by the probate court must lay off and set apart the same, &c., and the title to such land shall vest in the widow and child or children. If the real estate can not be so divided, and the appraisers shall so report, the probate court must order the executor or administrator to sell the real estate, and pay to such widow, or widow and child or children, five hundred dollars of the proceeds of the sale.

The omission of the creditors to file their claims against the estate could not annul the decree of insolvency.—*Puryear v. Puryear's Distributees*, 34 Ala. 555.

It does not appear from the transcript that the widow had made any claim for dower, though it is argued by the counsel for the appellees that she had. But if she had made such an application, it would not avail the contestants.—*Jordan v. Strickland*, 42 Ala. 315; *Chisolm v. Chisolm's Ex'rs*, 41 Ala. 327.

There can be no doubt of the right of the widow and her children to the claim which they have applied for, unless they have forfeited it by their *laches*. In ordinary cases, where an execution is levied on property, the exemption is lost unless it is claimed before the sale.—*Simpson v. Simpson*, 30 Ala. 225. In cases of estates undergoing administration, the administrator is protected for eighteen months from the rendition of judgment in favor of creditors, in order that he may ascertain the solvency or insolvency of the estate. All existing claims of creditors not presented within that time are barred, and no heir or distributee can call upon him for distribution without proving that the estate is free from debt. No one is authorized to report the estate insolvent but himself, and he is made personally liable to the creditors if he suffers an execution against the estate to be returned "no property found." The widow and children can not know the extent of their interest until he reports the estate insolvent or makes a final settlement.

In this case, the report of insolvency was made a short

Wilson v. Bozeman.

time after the sale of the land, and several months before the purchase-money became due. When the decree of insolvency was rendered, and it was necessary to resort to a sale of land, it became the duty of both the court and the administrator to protect the rights of the widow and children. They were not bound to move in the matter before they discovered themselves neglected, nor could they well do so until the report of insolvency was made. When that was done, their land had been sold for even less than the amount reserved to them by law, to pay debts from which it was exempt, whether the estate was insolvent or not. There is nothing in the defenses set up by the contestants which should defeat the application for the homestead.

The judgment is reversed, and the cause remanded.

WILSON *vs.* BOZEMAN ET AL.

[ACTION ON PROMISSORY NOTE.]

1. *Confederate money; contract based on loan of, void.*—A note, the consideration of which is the compromise of a note given for the loan of Confederate treasury-notes, is void as against the public policy of the State and of the United States.
2. *Error; when not cause of reversal.*—Where the record shows that upon the case made on the trial below the plaintiff is not entitled to recover, a reversal will not be allowed though error may have intervened in the proceedings in the court below.

APPEAL from the Circuit Court of Hale.

Tried before Hon. M. J. SAFFOLD.

Appellant brought this action against appellees to recover the amount of a promissory note made by them. They pleaded, "in short by consent," that the consideration of the note sued on was Confederate States treasury-

Wilson v. Bozeman.

notes, commonly called Confederate money; and further, "that the consideration of the contract sued on is illegal and void, and against public policy."

The plaintiff replied, "that the note sued on was signed and given by defendants to plaintiff in part payment and settlement, by way of compromise, of another note or claim which plaintiff held against them, and in making said compromise plaintiff agreed to reduce the amount of said claim or note and divide and extend the time for payment thereof, by taking defendants' notes therefor for about one-third of the original amount, payable one, two and three years after date of said settlement and compromise; which notes the said defendants then executed to plaintiff, and were received and accepted by him in settlement and compromise as aforesaid, and that the note sued on is one so given as aforesaid," &c.

The court sustained a demurrer to this replication; whereupon, the plaintiff took issue on defendants' pleas. The testimony shows that in May, 1863, plaintiff loaned defendants a considerable sum of Confederate money, and took their note therefor. In October, 1866, the parties met, calculated the value of the Confederate money originally loaned, by "reducing it first to gold and then to United States currency," and the value thus ascertained was divided into three equal parts and notes executed therefor as stated in plaintiff's replication.

The plaintiff reserved several exceptions to the rulings of the court below in the admission of evidence, and in consequence of these rulings was forced to take non-suit with bill of exceptions and leave, &c. The view taken of the case by the court renders unnecessary any further notice of the exceptions reserved in the court below.

W. & J. WEBB, for appellant.—1. At the time the compromise was made, the claim compromised was a legal and valid claim, and could then have been enforced by suit.—*Scheible v. Bacho*, 41 Ala. 423.

2. And this valid claim plaintiff forbore to sue, and ex-

tended the time of payment, and this was a sufficient new and legal consideration to support the compromise and notes given in pursuance thereof, notwithstanding a change of ruling of the courts.—*Curry v. Davis*, 44 Ala.; 1 Vroom (N. J.) 323; 4 Metcalf, 270; 3 Jones' (N. C.) Eq. Rep. 50.

3. Compromises are always favored, whatever the nature of the controversy settled.—5 Peters, 99; 2 Randolph, 442; 11 Conn. 12; 17 Conn. 511; 11 Vermont, 483; 8 Vermont, 144; Ord. No. 35, Conv. 1867.

4. By the compromise, and acts thereunder, all inquiry into the validity or invalidity of the original contract is precluded, when the parties bound knew all the facts. 1 Stewart, 35; *Curry v. Davis*, 44 Ala. 281; 30 N. J. 324; 3 Hill (N. Y.) 504; 4 Denio, 189.

5. Taking usury under the law in Aiken's Digest was as much against public policy then as lending Confederate money, yet, in *Standifer v. McWhorter*, (1 Stewart, 535,) this court refused to inquire into a compromise alleged to be tainted with usury.

6. It is against public policy to unsettle compromises, as much so as it is to prevent enforcement of contracts contrary to public policy.

7. The contract here is more than a mere renewal of the old debt. The old debt was extinguished by the compromise.—*Ware et al. v. Willis*, 44 Ala.

8. Plaintiff does not have to rely on the illegal consideration to sustain his contract, and may therefore recover. *Swan v. Scott*, 11 Serg. & Rawle, 155. On this principle alone can C. J. Marshall's decision in *Armstrong v. Toler*, (11 Wheaton, 258,) be upheld.

SOMERVILLE & McEACHIN, and A. B. PITTMAN, *contra*.—

1. The original contract, being based upon an illegal consideration, was void as against the public policy.—*Hale v. Houston*, *Sims & Co.*, 44 Ala. 134; *Lawson v. Miller*, *ib.*

In the latter case, it was held that "a promissory note made in this State in renewal of such a note since the suppression of the late rebellion, is illegal and void, and no

action can be maintained upon it in the courts of this State." Certainly a mere remittal of a portion of the illegal consideration, or a reduction of the amount to be paid, would not purge the original illegal transaction. The consent of parties, however expressed, can not remove what the law calls the "sting of disability." An illegal contract can not be compromised into one that is legal.—See *Coppell v. Hall*, 7 Wallace, 558.

The decisions in cases of usurious contracts are uniformly in harmony with these obvious principles.—4 N. Y. Digest, p. 1195, §§ 16, 17, 18, 36.

2. If it is contended that any new consideration, as the extension of time, has been interpolated into the new note, it is a sufficient answer that a portion of the consideration, which is not susceptible of division or apportionment, is for Confederate money; and this vitiated the contract.—3 Cold. (Tenn.) 470; 2 Kent's Com. 468; Chitty on Contr. 573; 22 Maine, 488; 14 N. Y. Rep.; 11 Wheat. 258.

3. The case of *Curry v. Davis*, (44 Ala. 281,) which holds the compromise of an "invalid" claim to a sufficient consideration to support an action, may be relied on by appellant. This case was one of a doubtful, not an illegal claim, and is therefore not in point.

4. Where the consideration of a contract is forbidden and denounced by law; where the contract, on account of the illegality of the consideration, is against public policy and void, there can be no waiver or compromise of the defense of illegal consideration. Such defense is exceptional, allowed for the sake of the public, and the same public policy which allows it in the first place, forbids all efforts to compromise it.—14 Sm. & Mar. 25; 8 *ib.* 638; 10 *ib.* 97; 40 Miss. 341; 41 Miss. 187; *Kidder v. Blake*, 45 N. H. 530.

PETERS, J.—This is an action of debt founded upon a promissory note given in compromise of debt for the loan of Confederate treasury-notes. A contract based upon such consideration is void, as against the public policy both

of the State and the general government, and no recovery can be had upon it in our courts.—*Lawson v. Miller*, 44 Ala. 616; Rev. Code, §§ 1176, 1177, 3643, 3644.

The facts set out in the record show that the plaintiff in the court below was not entitled to recover. When this is the case, such errors as may have been committed in the course of the trial below are errors without injury, and would not justify a reversal. For this reason, it is unnecessary to look into the other assignments of error in this case.—Shep. Dig. p. 568, § 82.

The judgment of the court below is affirmed.

•

BALKUM *vs.* BREARE.

[BILL IN EQUITY FOR ACCOUNT.]

1. *Fraud; to what equity will look in determining.*—Equity will not only regard the nature of the bargain, but also the sex and circumstances of the parties to it, when the controversy involves a question of fraud. A widow woman in feeble health, with a family of children in helpless poverty, will not be treated as the equal in a business transaction with a well informed, influential and prosperous merchant.
2. *Account; when will be decreed.*—Mrs. B., a widow in feeble health, with a family to provide for, in extreme and distressing poverty, earned \$446 in the year 1867 as a teacher in a public school in this State, for which she filed her account in a proper manner with the superintendent of the public schools of the proper county, but the payment of the claim thus filed was postponed and not made until April, 1870. Before it was paid, B., an influential and well informed merchant of the county, came to see her for the purpose of buying her claim. He represented to her that all the other teachers of the schools were selling their claims at fifty cents in the dollar; that the money to pay her claim had not been received by the superintendent, and might not be received in some months. Confiding in the truth of these representations, she sold her claim for fifty cents in the dollar, and received her pay. Shortly afterwards, she learned that B.'s representations were all false, and that he had deceived and cheated her, and that the money to pay her had been received and that B. had opportunities to know it.

Balkum v. Breare.

She went to him and proposed to cancel the trade for her claim and tendered him back the money he had paid, but he refused to do this, and collected her claim and applied the funds to his own use,—*Held*, chancery had jurisdiction, and would compel B., the merchant, to account to the widow for the proceeds of her claim so gotten possession of by him.

APPEAL from Chancery Court of Henry and Dale.
Heard before Hon. B. B. McCRAW.

The facts are sufficiently stated in the opinion.

OATES & COWAN, for appellant.—1. The demurrer to bill for want of equity should have been sustained. 1st. because fraud alone is not sufficient to confer jurisdiction on a court of chancery. “No matter how gross the fraud may be, if the party can have full, complete and adequate redress at law, he can not go into a court of equity.”—*Knotts v. Tarver*, 8 Ala. 743.

The action “for money had and received” affords a full and adequate remedy at law for this alleged wrong.—*Sadler et al. v. Robinson’s Heirs*, 2 Stew. 620; *Russell v. Little*, 28 Ala. 160. The bill has not equity as a bill of discovery, because there is no disclosure sought of “deeds or writings, or other things in defendant’s custody, possession or power,” and because there is no disclosure sought of any fact resting solely in the knowledge of defendant, unless the alleged knowledge on his part of the reception by the county superintendent of the school funds, may be so considered. But even a knowledge by the defendant of this fact can not aid the complainant’s cause; for it was an extrinsic fact, the suppression of which from the knowledge of complainant, did not constitute fraud.—1 Story’s Eq. Jur. §§ 208–213. It was a fact which the defendant was under no legal or equitable obligation to communicate to complainant. Its suppression was not such an undue concealment as amounted to fraud in the sense of a court of equity, and for which it will grant relief. The definition of such undue concealment, or *suppressio veri*, as will avoid a contract, is laid down in Story’s Eq. Jur. § 207, to be the

“non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other; and which the latter has a right, not merely *in foro conscientive*, but *juris et de jure*, to know.” See *Laidlow v. Organ*, 2 Wheat. 178.

The demurrer should have been sustained—2d, because, in the fourth paragraph of said bill is an admission which shows that complainant entered into new stipulations with defendant concerning the alleged fraudulent transaction, after she became possessed of a full knowledge of all the attendant circumstances; and such being the case, a party can not claim a rescission of a contract for fraud after entering into new stipulations concerning it.—2 Stewart, 520; 14 Ala. 9; 1 Story’s Eq. Jur. § 203; *Parsons v. Hughes*, 9 Paige, 591; 7 Smedes & Marshall, 544; 2 Ves. sr. 126; 9 Ves. 364; Fonbl. Eq. 129, note *r*.

M. A. BELL, *contra*.

PETERS, J.—This is a bill in equity, filed by Mrs. Breare, the appellee, against Balkum, the appellant, to compel him to account to her for a certain balance of the proceeds of a certain claim in her favor, against the superintendent of the public schools in the county of Henry in this State, which said Balkum had gotten from her by fraud, falsehood and overreaching her, and collected. On the hearing in the court below, there was a decree in favor of the complainant, Mrs. Breare, in conformity with the prayer of her bill. From this decree the respondent, said Balkum, appeals to this court, and here assigns the following errors:

1. “The chancery court erred in overruling the demurrer of appellant.

2. “The chancery court also erred in rendering a decree against the appellant, as shown in the record.”

The main allegations of the bill may be condensed in substance as follows: The complainant, Mrs. Breare, a regularly employed teacher of one of the public schools in

the county of Henry in this State, during the year 1867, earned the sum of \$446 as a teacher of such public school, and properly filed with the superintendent of the public schools in said county her account for the same. She was a widow, with a family of children, and extremely poor and necessitous; so much so, that she had taught the school allotted to her "upon bread alone for her food, except as her neighbors had furnished her with messes of meat." That the payment of her claim had been delayed until in April, 1870, when Balkum came to her house with the "express purpose of overreaching and defrauding her," and proposed to buy her claim for fifty cents in the dollar. She was then in feeble health and extremely poor and necessitous, and he was a person of such standing and superior information that she placed the utmost confidence in the representations made by him. He then represented to her that the teachers were all selling their claims; that it would cost her one hundred dollars to get her account made out again; that the school money had not been received by the superintendent; that he did not know when the money would come, and that it would be at least three or four months before she would get her money. Upon these representations she transferred her account to said Balkum for fifty cents in the dollar, about one half it was worth. Shortly afterwards she learned that these representations were all false, and that at the time they were made and said transfer had been effected, sufficient funds had been received by the superintendent of said public schools in said county for the payment of her claim, to-wit: about the sum of \$5,100, which was known to Balkum. And on the discovery of the cheat, she informed him of her dissatisfaction; and feeling that she had been cheated she proposed to take twenty dollars in addition to what had been paid, but this was refused, and ten dollars more was paid her. She then tendered him back his money paid to her and offered to rescind the contract of assignment, which was refused by Balkum. Balkum, under his possession derived as aforesaid, held on to the claim and col-

lected it, and appropriated the proceeds to his own use; by which the complainant had lost \$211, which she had unwillingly surrendered.

The bill made proper parties defendant and prayed appropriate relief. A demurrer for want of equity was overruled.

A demurrer to the bill for want of equity admits the truth of all the facts stated with reasonable certainty.—Story's Eq. Pl. § 452. The bill alleges that the complainant confided in the statements of the respondent, and that he was a person in whom she had reason to confide; that by his false assertions she had been overreached and defrauded of the sum of \$211, and which sum she had been forced by his unconscientious conduct unwillingly to surrender to him. This is a sufficient allegation of a fraud, particularly where the defrauded party is a female, oppressed with extreme poverty and the cares of a family of helpless children. Courts of equity have wisely refrained from laying down any general definition of fraud, as remediable in that court. Fraud is said to be infinite, and if the jurisdiction is once hampered by prescribed limits, it will be perpetually eluded by new schemes which the fertility of man's invention would create.—1 Story Eq. §§ 186, 187, 188, 189, and cases cited. Besides, fraud may be presumed from the condition and circumstances of the parties contracting.—*Chesterfield v. Jansen*, 2 Ves. 155–6; *Boney v. Hollingsworth*, 23 Ala. 690. If the bargain be such as no man in his senses and not under delusion would make on the one hand, and no honest and fair man would accept on the other, it is liable to be denounced as inequitable and unconscientious, and held void both at law and in equity. 2 Ves. 155–6, *supra*; 1 Story Eq. §§ 189–90. In this case the court can not shut its eyes to the fact that the complainant is a widow, in feeble health and extremely indigent, burdened with the support of a family of children dependent upon her, as she intimates in her bill, in very “distressing circumstances.” Such a person, so situated, in a christian country, stripped of all political power for

her protection, timid and weak by nature in the physical force necessary for her defense, and without any standing in the high places of justice to influence the interpretation of the laws in her favor, is entitled to expect in every male citizen she meets a guardian and a truthful friend. In her isolation and weakness, this is necessary for her just protection. These circumstances can not be left out of view in this case. Mrs. Breare was not in a condition to deal with Balkum on equal terms. He used his superior opportunities to deceive her, and the bill alleges that this deception was accomplished by falsehood, greatly to his profit and to her loss. In other words, he sold his deceptions at a high price, and forced her to pay it, very much against her wishes. I know no principle of equity to invoke in sanction of such a transaction. I therefore think the bill is not without equity, and that the demurrer was properly overruled.

The second assignment of error upon the decree in the court below is also without sufficient support. It is true, that the answer of Balkum flatly denies many, if not all, of the material allegations of the bill. But the evidence of Mrs. Breare and Miss McKay overturns these denials of the answer, and sustains the bill. Besides, the testimony of Kinsey makes a much stronger case than that made in the bill; and it also sustains, in some important particulars, the complainant's case. From Kinsey's evidence, it may be fairly inferred that Balkum knew that the funds to pay Mrs. Breare's account had been received by the superintendent, before he applied to purchase the claim, and that such funds had been deposited with Kimbrough & Co., of which Balkum was a partner, before the purchase. If this was really so, it might happen that he paid Mrs. Breare for her claim with her own funds, at half price. Such a transaction could not be sustained in equity. The partnership of Kimbrough & Co., of which appellant was a member, by accepting the deposit of the school funds in their house, made themselves trustees, in equity at least, to hold it for the use of the beneficiaries, of whom Mrs. Breare was one.

Camp v. Elston.

This forbid their use of it for their own profit, or for the profit of any member of the firm, without the consent of the beneficiaries.

But, however this might have been, the decree of the court below is in conformity with good conscience and the clear preponderance of the proof. It is therefore affirmed at the appellant's costs in this court and in the court below.

CAMP vs. ELSTON.

[BILL QUIA TIMET, &C.]

1. *Bill quia timet ; when without equity.*—A bill *quia timet*, or for performance of a contract of sale of lands by an administrator with the will annexed under a power given by the will, should not be entertained when the allegations of the bill show that the title of the complainant is either good and sufficient at law or wholly void. In either aspect, there is a well known and adequate remedy at law.
2. *Same ; cross-bill.*—A cross-bill filed in such a case should not be retained, after the dismissal of the original bill, merely as a means of enforcing the collection of rents, as there is also in such case an adequate remedy at law.—Rev Code, § 2607.
3. *Same ; practice.*—In such case both bills should be dismissed without prejudice, and the costs divided.

APPEAL from Chancery Court of Talladega.

Heard before Hon. B. B. McCRAW.

The facts upon which the case turns are sufficiently stated in the opinion.

TAUL BRADFORD, for appellant.

LEWIS E. PARSONS, *contra*.

[No briefs came into Reporter's hands.]

PETERS, J.—The bill in this suit alleges, among other

things, that Oliver H. Elston departed this life in the county of Talladega in this State on November 8, 1857, after having made and published his will, which was admitted to probate and recorded in the probate court of said county of Talladega, in which the testator resided at his death. The persons appointed executors in said will accepted the trust, and undertook the administration of said testator's estate. But after having conducted said administration for some time, they resigned their office of executors as aforesaid, and made final settlement of their administration in said probate court as required by law, and Mary E. Elston, the widow of said testator, was duly appointed administratrix *de bonis non*, with the will annexed, of the estate of Oliver H. Elston, deceased, was duly qualified as such, and entered upon the discharge of her duties as such administratrix as aforesaid. In executing her duties as such administratrix, said Mary E. Elston sold a portion of the lands of her said testator to said Joseph Camp. The power in the said will, under authority of which said sale was made, is in these words: "I will to my beloved wife, Elizabeth Elston, after my just and legal debts have been paid, my entire estate, consisting of lands, negroes, stock, &c., so long as she remains a widow, or should deem it necessary as my children become of age to give each a distributive share. Should she marry, I bequeath to her alone a child's part. It is my desire that my two young mules, my sorrel mare, and so much of my old tract of land and my bank stock, and a negro girl named Violet, should be sold, which is left discretionary with my executors and beloved wife, as will pay my debts." Mrs. Elston was appointed administratrix as aforesaid on the 6th day of May, 1859; and said sale of said lands to said Camp was made on the 26th day of November, 1861. The deed from Mrs. Elston to Camp seems to be perfectly regular and formal, and under it Camp paid the purchase-money and was put into possession of the lands therein conveyed. After this, on April 15th, in the year 1869, the probate of said will was set aside and declared null and void, and the letters

testamentary to Mrs. Elston were revoked by order of said probate court of said county of Talladega. And the bill alleges that a portion of the heirs of said deceased testator had threatened to disturb said Camp in his possession of said lands under said deed, and that he had fears that their threats would be carried into effect. The bill concludes with a prayer for a perpetual injunction against Mrs. Elston and her children who are heirs of said testator, to restrain them from recovering said lands by suit at law. There is a cross-bill by the widow and certain of her said children, in which they insist upon the total invalidity of said sale, and that said deed is wholly void, and ask that the said Camp account for rents and occupation of said land during his possession of the same under said sale. There is much other matter alleged in the said original bill and said cross-bill, which is omitted here, as it does not influence this opinion or the law of this case. On the hearing, the learned chancellor dismissed the original bill and retained the cross-bill.

From this decree the complainant, said Camp, who is appellant in this court, brings the case here by appeal, and assigns the action of the court below as error.

I purposely avoid any expression of opinion in this discussion on the validity or invalidity of the proceedings in said court of probate, as to the probate of said will or the setting the same aside as null and void, or as to the validity or invalidity of said sale of said lands to said Camp. These are questions not necessarily involved in the discussion of this case, as the same is presented in said original bill and said cross-bill.

Passing from this part of the discussion without further remark, it is obvious that the bill in this case can not be maintained, in whatever light it may be viewed. Mrs. Elston's sale of the lands mentioned in her deed to Camp was made without an order of court, but under the power given her by the will. If the sale made by Mrs. Elston was valid, as is insisted in the complainant's bill, then her deed was valid, and it passed a good title to Camp, and his remedy

at law is without embarrassment; because the deed vested in him a sufficient legal title, which is susceptible of affording him a full defense at law.—Rev. Code, § 2599. In such a case equity will not interfere.—Shep. Dig. p. 287, §§ 5, 6. If, on the other hand, the sale was wholly void, then the deed is void; and chancery can not give that validity which the law forbids and is wholly void. That which is void, is as though it did not exist. It is absolutely null, and can not be confirmed or made effectual. It necessarily follows, from this view of this case, that there is no equity in the original bill. It was, therefore, properly dismissed.

The original bill having been dismissed, the cross-bill became a mere attempt to collect the rents of the lands in controversy, for use and occupation, during the time the same had been in the possession of Camp under his deed. If the deed was valid, there was no rents due. If it was invalid, as the complainants in the cross-bill insist, then there was a sufficient and well ascertained remedy at law. Rev. Code, § 2607. For this reason, the cross-bill should also have been dismissed; but both without prejudice to an action at law, in favor of the parties to the original or the cross-bill.

The learned chancellor, then, erred in retaining the cross-bill. For this error, the judgment of the court below is reversed; and this court, proceeding to render the judgment that should have been rendered in the court below, doth order, adjudge and decree that the said original bill and said cross-bill be dismissed out of this court, but without prejudice to any action at law or in equity that the parties to this suit may hereafter choose to institute touching the matters in controversy in this suit. And the costs in this court and the court below will be divided between the parties.

WILLIAMS *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Change of venue ; certificate of clerk, what must be certified.*—In a change of venue of a criminal case, the certificate attached to the transcript of the proceedings in the court from which the cause is removed, must show in what court the matters certified occurred, and be authenticated under the hand of the clerk and the seal of the court. If there be no seal, it must be so stated, and the connection of the clerk with the court must be otherwise represented.
2. *Arrest of judgment ; what not ground for.*—The separation of the jury, after the cause is submitted to them, is ground for a new trial, but not for arrest of judgment.
3. *Service of list of jurors, &c. ; what is mere irregularity.*—The service upon a prisoner of a list of jurors, containing one less than the number ordered by the court to be summoned, but more than the least number required by section 4173 Revised Code, is a mere irregularity, waived, unless objected to in the court below.

APPEAL from the Circuit Court of Lauderdale.

Tried before Hon. JAMES S. CLARK.

The facts upon which the decision is based are sufficiently set forth in the opinion.

Neither the record nor docket gives the name of appellant's attorney.

The Attorney General appeared for the State.

[No briefs reached the Reporter.]

B. F. SAFFOLD, J.—The appellant was convicted of murder in the first degree, and sentenced to imprisonment in the penitentiary for life.

The venue having been changed from Colbert county to Lauderdale, he objected, on the trial, to the introduction in evidence of the transcript of the proceedings in Colbert circuit court, on the ground that it was not properly authenticated.

The certificate attached does not recite that the proceedings certified occurred in the circuit court of Colbert county, or in any court except so far as the matters enumerated pertain to some court. It is signed, "Witness my hand this, 12th day of October, 1871, S. N. L. McClusky, clerk." Section 4209, Revised Code, referring to criminal cases, simply requires the clerk to attach his certificate to the transcript. But section 2766 of the Revised Code, directs the certificate, in civil cases, to be under the hand of the clerk and the seal of the court.

In *Collier v. The State*, 2 Stew. 388, the certificate was regarded as sufficient, though under the hand of the clerk only, it appearing that he had no seal. But the point in that case was the power of the clerk to make a certificate out of his county. In *King v. Hare*, 13 East, 189, an affidavit, sworn before "Charles Hayward, a commissioner, &c.," without stating that he was a commissioner, *in this court*, was rejected, while one sworn in court, and another before Justice Bayley, were admitted.

As the transcript is nothing without a proper authentication, we can not look to it in aid of the defects of the certificate. Each court will notice who are its officers, but not who are the officers of the other courts.—1 Phil. Ev. 622. The certificate is fatally defective in not stating that the proceedings certified were those of the circuit court of Colbert county, and that the officer certifying was clerk of that court. If he had no seal of office, he should have so stated.

The separation of the jury, after the cause was submitted to them, and before verdict rendered, is not a ground of arrest of judgment.—*Coker v. The State*, present term.

The objection that the list of jurors served on the prisoner, contained the names of ninety-nine persons only, though the order of the court directed the sheriff to summon one hundred, can not be sustained. § 4173, Revised Code, requires the summoning of not less than fifty nor more than one hundred persons, including the regular jurors for the week. As it was the province of the court

to decide whether there should be more than fifty or not, and the omission of one out of the number ordered was not the act of the court, but the irregular discharge of his duty by the sheriff, the defendant's failure to make the objection at the trial must be considered a waiver of irregularity.

The judgment is reversed and the cause remanded.

MERRITT ET AL. *vs.* PHENIX.

[BILL IN EQUITY TO FORECLOSE MORTGAGE.]

1. *Bill to foreclose mortgage; who material defendant.*—A purchaser from a mortgagor of mortgaged premises, who has himself mortgaged them to his creditor, is a material defendant to a bill of foreclosure filed by the first mortgagee, notwithstanding his mortgagee has sold the property and become the purchaser, if he retains his equity of redemption.
2. *Same; mesne purchasers not necessary parties.*—To foreclose a mortgage, it is not necessary that mesne purchasers who have no interest should be brought before the court.
3. *Acknowledgment of conveyance; what defective.*—An acknowledgment of a conveyance of land which does not recite that the grantor is known to the officer, is not in substantial compliance with the form prescribed by section 1548 of the Revised Code.
4. *Same; effect of.*—But a certificate, written upon such a conveyance, signed by an officer, that the maker appeared personally before him and acknowledged that he signed, sealed and delivered the foregoing deed to the grantee, is equivalent to the attest of one witness required by section 1535 of the Revised Code.
5. *Recording of conveyance; when operates as notice.*—The recording in the proper office of any conveyance of property, which may be legally admitted to record, operates as a notice of the contents of such conveyance, without any acknowledgment or probate thereof, and its due execution may be proved.

APPEAL from the Chancery Court of Montgomery.
Heard before Hon. ADAM C. FELDER.

Phenix, a citizen of the chancery district composed of the county of Montgomery, filed his bill in the chancery court of Montgomery, praying the foreclosure of a mortgage executed in the year 1858 by one John A. Merritt, a citizen of Butler county, to complainant on certain lands lying in the county of Pike.

The bill alleges that after the execution of the mortgage Merritt sold the lands to Joel M. Talbot, a resident of Montgomery county, with notice of and subject to said mortgage, and that Talbot sold the land mentioned to Arthur Hoyt and Joseph Lockley, both residents of Montgomery county, and Lockley afterwards conveyed his interest to W. B. Hoyt, also a resident of Montgomery county; that the two Hoyts executed a mortgage, on the land mentioned, to H. J. Sweeney, a citizen of Pennsylvania, who at the time of the making of the mortgage, to-wit: June, 1866, loaned money to said Hoyts upon the faith of said mortgage; and the amendment to the bill alleges that he, as well as all the defendants, was a purchaser with notice of complainant's mortgage. The Hoyts failing to repay the loan at maturity, Sweeney, in accordance with the powers given by their mortgage to him, sold the premises and himself became the purchaser. Complainant further alleged that the lands are worth much more than the amount pretended to have been paid by Sweeney, and were subject to redemption by the Hoyts.

The record does not show the nature of the conveyances from Merritt to Talbot or from Talbot, to the Hoyts and Lockley, whether by quit-claim or warranty deeds, nor the dates thereof.

Complainant alleges that his mortgage, which is made an exhibit to the bill, was duly acknowledged and recorded in the office of the judge of probate for Pike county at the time it was made, and makes the mortgage an exhibit to the bill.

The mortgage is properly signed, and in all respects regular, but there were no attesting witnesses, and the certificate of probate thereof is as follows:

"State of Alabama, } Be it remembered that the above
 Pike county. } John A. Merritt appeared personally before me, Samuel M. Adams, a justice of the peace for Pike county, and acknowledged that he signed, sealed and delivered the foregoing deed to the aforesaid James Phenix on the day and year above mentioned.

"Given under my hand and seal, this 9th of February, 1858.
 SAM'L M. ADAMS, J. P."

Endorsed on the deed was the following:

"Received in office for record February 15th, 1858, and recorded on the 18th of said month, in deed-book K, pages 350-6.
 BIRD FITZPATRICK, Judge of Probate."

Sweeney, Merritt, and the two Hoyts were made parties defendant.

Sweeney, who alone appeared, demurred to the bill—

1st. Because it showed that no material defendant in the cause resides in the county and chancery district in which the bill is filed.

2d. For non-joinder of Talbot and Lockley, whom the bill shows to be necessary parties.

3d. Because the bill shows that Sweeney was a creditor and purchaser, and shows that said mortgage, which is an exhibit to the bill, was not legally acknowledged, and that the recording and registration thereof are void.

The demurrer was overruled. Sweeney answered, admitting the allegations of the bill, with the exception of that part which charged him with notice of complainant's mortgage. He pleaded that he was a *bona fide* purchaser for a valuable consideration, without notice, &c.

It was admitted that the mortgage was recorded and probated as set forth in the bill, and that Sweeney had no actual notice of the same, and no notice whatever, except so far as the recording of the same in the office of the probate judge of the county in which the land lay was, in law, notice to him.

Complainant proved by the deposition of Merritt the due execution of the mortgage; that it was voluntarily made; that he acknowledged it before Adams, the justice

Merritt et al. v. Phenix.

of the peace, and that at the time of the acknowledgment he had been personally known for many years to the justice; and proof was made by Adams, the justice of the peace, that the mortgage was in fact executed in his presence, and that he well knew Merritt at the time of its acknowledgment.

The chancellor decreed a sale of the mortgaged premises, and that the proceeds of sale be applied to the satisfaction of complainant's mortgage, and the surplus, if any, paid to Sweeney; and hence this appeal.

The errors assigned are—

1. Overruling the demurrer.
2. The decree rendered.

WALKER & MURPHEY, for appellant.

MARTIN & SAYRE, *contra*.

B. F. SAFFOLD, J.—The purpose of the bill was the foreclosure of a mortgage of land which the appellant Merritt had executed to the complainant Phenix. It is alleged that after the mortgage was given, Merritt sold the land to Joel M. Talbot, who sold to Arthur Hoyt and Joel Lockley. Lockley sold his interest to William B. Hoyt. The two Hoyts mortgaged the property to H. J. Sweeney, who sold it under this second mortgage and became the purchaser himself. All of these parties were made defendants, except Talbot and Lockley.

The defendant Sweeney, who alone resists the decree sought, admits the allegations of the bill, but by demurrer objects to the local jurisdiction on several grounds, the only contested one being that the defendants who reside in the district in which the bill is filed are the Hoyts, and they are not material defendants. He also assigns the additional grounds that Talbot and Lockley are not made defendants; and that he was a purchaser without notice, because the complainant's mortgage is not acknowledged as required by law, and therefore its record is void.

The demurrer was overruled, and a decree rendered in favor of the complainant.

Arthur and W. B. Hoyt were material defendants, because they had the right to redeem the land from the complainant.—Story's Eq. Plead. § 183. It does not appear that the mesne purchasers, Talbot and Lockley, were interested through any warranty they had made. Whatever right they acquired they seem to have parted with by their sales to those who are defendants, and therefore were not necessary parties.—*Haley v. Bennett*, 5 Port. 452; *Lewis v. Elrod*, 38 Ala. 17.

The acknowledgment of the complainant's mortgage is not in substantial compliance with the form prescribed by section 1548 of the Revised Code. But the only consequence of its defectiveness is that the mortgage does not gain the privileges as evidence conferred by section 1544 of the Revised Code. It is, nevertheless, a conveyance of property, which may be legally admitted to record without any acknowledgment or probate thereof, the recording of which operates as a notice of its contents.—Revised Code, § 1543. The acknowledgment taken, though insufficient as such, is equivalent to the attest of one witness, required by section 1535 of the Revised Code. As the conveyance was not sufficiently authenticated to be received in evidence, it was entirely competent to supply the deficiency by further proof of its due execution.—Rev. Code, § 1544.

The decree is affirmed.

NOTE BY REPORTER.—At a subsequent day of the term appellant, by his counsel, A. J. Walker, petitioned for a rehearing, and filed in support thereof the following argument:

The proposition upon which the case hinges, that the Hoyts are material parties, upon the ground of their right of redemption from Phenix, the complainant, or any other ground, we most respectfully yet earnestly controvert.

The land was mortgaged by Merritt to Phenix. This mortgage left a right to redeem in Merritt. Merritt afterwards conveyed to Talbot. By the conveyance to Talbot, Merritt parted with his right to redeem, (or equity of re-

demption,) and the same thereby passed to Talbot. Talbot then conveyed to Lockley and Hoyt. Thereby the equity of redemption passed to Lockley and Hoyt.

Lockey conveyed his share to another Hoyt, and thus the two Hoyts became the owners jointly of the equity of redemption. The right of the Hoyts passed by a mortgage, and its subsequent foreclosure by the execution of a power of sale, to Sweeney.

Through all the conveyances, from Merritt down to Sweeney, the equity of redemption in Merritt passed regularly down to Sweeney, and he was, at the commencement of this suit, and still is, the sole owner of the right to redeem reserved to the mortgagor, if any such right exists. This being the case, and for that reason, it is positively decided and clearly settled that the Hoyts are not material parties.

Let the court observe, that a *material* party is a *necessary* party, and then inquire, in the light of the authorities, whether the Hoyts were material parties. In the case of *Batre v. Auze*, (5 Ala. 173, 177,) it was held, in reference to a bill to enforce a vendor's lien, as follows: "The case made by the bill is very similar in all its analogies to a mortgage; indeed, the lien of a vendor for the purchase-money is considered as an equitable mortgage. In the relation which Lefebve stands to the land, having parted with all his interest by sale and conveyance, it is certain he is not an *indispensable* party; but it is equally certain, we think, that he could be joined as a defendant at the election of the plaintiff."

In the case of *Mims v. Mims*, (35 Ala. 23, 25,) it was held that after the entire interest of a mortgagor had been transferred to a purchaser at a sale under execution, the mortgagor was not an indispensable or necessary party defendant to the mortgagee's bill to foreclose.

The same principle is plainly laid down in Story's Eq. Pl. § 197, p. 199, as follows: "When the mortgagor has conveyed his equity of redemption absolutely, the assignee only need be made a party to the bill to foreclose."—2 Hilliard on Mort. 145, § 38.

From the authorities above cited, it is plain that the dispensing with the mortgagor and all holders intermediate between him and the present owner, rests upon the ground that they have parted with their interest.

The learned justice who delivered the opinion in this case cites Story's Eq. Pl. § 183, in support of the proposition that the Hoyts were indispensable parties on account of their right to redeem.

This paragraph relates to parties to suits to redeem, and not of foreclosure.

Even in suits to redeem, it is not said that the mortgagor is an indispensable party. On the contrary, it is cautiously remarked that "the mortgagor should, or at least may, be made a party." In a note to that paragraph, the distinction is drawn between indispensable parties and parties who may properly be joined.

The paragraph 183 alludes to the case of a bill to redeem, by the assignee of the mortgagor, who has assigned free of incumbrance, and is therefore still bound for the mortgage debt, the payment of which must be precedent to the redemption. That case surely can not be analogous to this bill to foreclose, when the entire interest has passed from the mortgagor through a succession of alienees to Sweeney.

The interest of Hoyt is merely the remotely consequential one of a warrantor of title, which has never been deemed sufficient to constitute one an indispensable party. Story's Eq. Pl. 76.

Hoyt has not, and can not have, any right to redeem; because he has aliened his entire interest. It is therefore respectfully submitted, that the necessity of Hoyt as a party can not result from any right to redeem. This becomes plain, if the question be asked, whether Hoyt, having aliened to Sweeney, could redeem?

If Hoyt has a right to redeem, so must Talbot and Lockley. Talbot and Lockley, like Hoyt, are mesne conveyancers. If the one has a right to redeem, so must the other.

The difference, however, is said to consist in the fact that Talbot and Lockley must be presumed to have conveyed without warranty. Now, on demurrer, the pleadings are to be most strongly construed against the pleader, and if the bill is silent as to the question, whether Talbot and Lockley were warrantors of the title, then the presumption must be against the complainant, who must be presumed to have stated the case as strongly for himself as it is capable of being stated.—Story's Eq. Pl. 452, *et seq.*

Construing the pleading against the pleader, and denying to him the right to supply an allegation by presumption, we must intend that Talbot and Lockley were warrantors of the title, and, therefore, the failure to make them parties is not excused upon the ground of their not appearing to be warrantors of title.

But it is respectfully insisted that the mere fact that one may be bound as a warrantor of title does not make him an indispensable party, and that, therefore, neither Hoyt nor Talbot and Lockley were necessary or indispensable parties, but that no discrimination can be made. If Hoyt was a necessary party, so were Talbot and Lockley. If the demurrer is not sustained upon the ground that Hoyt was not a necessary party, it must be sustained upon the ground that Talbot and Lockley were necessary parties.

In none of the cases decided in this State is any point made on the fact of the party's having, or not having, conveyed with warranty. The absence of warranty is merely mentioned in *Lewis v. Elrod*, (38 Ala. 19); but the decision is put purely upon the ground that the party was not indispensable because she had parted with all her interest. *Haley v. Bennett*, 5 Porter, 452; *Batre v. Auze*, 5 Ala. 173; *Mims v. Mims*, 35 Ala. 23; *Lewis v. Elrod*, 38 Ala. 17.

At the present term the following response was made to the application for rehearing, by

SAFFOLD, J.—If the Hoyts had not been made parties defendant, and could have enforced their statutory right to redeem the mortgaged property before the final decree,

the complainant's suit would have failed. This being so, they were material defendants. Talbot and Lockley retained neither the equity of redemption, nor the right of redemption.

The rehearing is denied.

BEAVERS *vs.* HARDIE & CO.

[ACTION AGAINST COMMISSION MERCHANT TO RECOVER DAMAGES FOR SELLING COTTON CONSIGNED CONTRARY TO INSTRUCTIONS, &C.]

1. *Complaint; what is in case and is sufficient.*—A complaint which sets forth that the defendants, as commission merchants, received from the plaintiff certain described goods for sale for a reward, under instructions not to sell them for less than a specified price, which they promised to observe, but that they did afterwards sell the said goods for less than that amount, to-wit, the sum of —, &c., is in case, and sufficiently states a breach of duty.

APPEAL from Circuit Court of Talladega.

Tried before Hon. M. J. SAFFOLD.

This case turns upon the pleadings. The Reporter has therefore thought it best to set out the first count upon which the decision turned. This count was as follows:

“The plaintiff claims of the defendants five thousand dollars as damages, for that the said defendants heretofore, to-wit, on the — day of March, 1854, as factors and commission merchants, received from the plaintiff one hundred and one bales of cotton, weighing fifty-one thousand, eight hundred and fifteen pounds, on storage and for sale by the defendants for a reward, with instructions by and from the plaintiff, not to sell said cotton unless they could and did get the sum of ten cents per pound for the same, and the said defendants then and there promised they would not

sell said cotton unless they obtained the said sum of ten cents per pound for the same, amounting to the sum of — dollars. Yet the said defendants did, afterwards, to-wit, on the — day of April, 1854, and before the commencement of this suit, sell said cotton for less than that amount, and at the sum of seven and one-fourth cents per pound, amounting only to — dollars.”

The other counts were substantially the same as the first, except the amended complaint, which was trover.

To this complaint the defendants demurred—to each count separately, and to the complaint as a whole. The opinion of the court sufficiently shows the grounds of demurrer assigned. The circuit court sustained the demurrer, and this ruling is now assigned as error.

JOHN T. HEFLIN, and J. B. MARTIN, for appellant.—Each count in the complaint is substantially the same as to the *gravamen*, and is varied in statement to meet the different phases of the evidence. A complaint, the *gravamen* of which is a breach of duty arising out of a contract, is in the nature of an action on the case. The breach of duty is tortious. In cases of express contract which create a duty, a party is not bound to declare upon the breach, but may declare in *tort*, and aver the negligence of the defendant to perform his duty.—*Myers v. Gilbert*, 18 Ala. R. 471; 1 Chit. Pl. 135; *Blick v. Briggs*, 6 Ala. 687.

L. E. PARSONS, and ALEX. WHITE, *contra*. (No brief on file.)

B. F. SAFFOLD, J.—The complaint is composed of seven counts, to each of which and to the complaint as a whole a demurrer was sustained. The counts are by no means as explicit as they should be. Whether they are so defective as not to contain a cause of action, and so drawn as to constitute a misjoinder of actions, are the questions to be determined.

The first count claims damages of the defendants because they, as factors and commission merchants, received from the plaintiff one hundred and one bales of cotton on

storage and for sale for a reward, under an agreement not to sell the said cotton for less than ten cents a pound. They, however, sold the cotton for seven and a quarter cents a pound. Is this a sufficient statement of a cause of action, and if so, is it an *assumpsit* or case?

The Revised Code, in section 2629, requires all pleadings to be as brief as is consistent with perspicuity, and the presentation of the facts or matter to be put in issue in an intelligible form; and allows no objection for defect of form, if facts are so presented that a material issue in law or fact can be taken by the adverse party thereon. Its schedule of forms of pleading in civil proceedings, beginning on page 673, contains the form of a complaint applicable to most causes of action, if not to all. Of actions *ex delicto* there is a form for trover in that for the conversion of chattels, for detinue in the one for the recovery of chattels in specie, for trespass, and for case in several special instances. All of these forms have been uniformly held to be sufficient in the cases to which they were applicable, whether in actions *ex contractu* or *ex delicto*. The statute law has not, in its effort to simplify pleading, destroyed the distinction of actions as observed by the common law. Hence, in reference to the joinder of forms of action, a count in *assumpsit* can not be joined with one in case or trover.

Assumpsit and case are frequently concurrent remedies, and sometimes, when the cause of action is not fully set out, it becomes a nice question to which of these forms the count or complaint shall be referred. Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in *assumpsit*, in which the promise is stated as the gist of the action. But where, from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although *assumpsit* may be maintainable upon a promise implied by law to do the act, still, an action on the case founded in *tort* is the more proper form of action, in which the plaintiff in his declaration states the facts out of

which the legal obligation arises, the obligation itself, the breach of it, and damage resulting from that breach.—1 Chit. Pl. 135.

The common law forms of declarations in case uniformly aver that the act or conduct of the defendant was *tortious*. In very many cases, this is indispensable; for instance, in those where there is no contract or agreement between the parties, and the defendant might have lawfully done what he is complained of for doing. But in *torts* growing out of breaches of contract, the *tort* and the breach are sometimes so intimately blended that even a sufficient statement of the case will leave the form of action doubtful.

In *Wilkinson v. Mosely*, (18 Ala. 288,) a test of distinction is stated to be, that if the cause of action, as set out in the declaration, arises from a breach of promise, the action is *ex contractu*; but if, from a breach of duty growing out of the contract, it is in form *ex delicto* and case. In the count under consideration, the only violation of duty charged against the defendants is selling the cotton for less than the price which they promised, and were instructed to obtain.—2 Chit. Plead. pp. 675 and 725a, the forms of counts for selling before default property pledged as security for a loan of money, and for not selling goods distrained for the best price, are in substance the same as the one under consideration, except that they aver a *tortious* intention and act of the defendant. Under our law of pleading such an averment is not necessary, if the facts related and the breach charged naturally indicate the *tortious* conduct.—*Blick v. Briggs*, 6 Ala. 687; *Austill & Marshall v. Crawford*, 7 Ala. 335–342.

We decide, that the first count is one in case, and as the other counts are less indefinite, the judgment must be reversed. The amended complaint seems to come more nearly under the head of trover, but that action may be united with case.

The judgment is reversed, and the cause remanded.

CANNON *vs.* McNAB AND THE EASTERN BANK.

[BILL IN EQUITY FOR ACCOUNT, &C.]

1. *Bank, violation of charter by circulating notes not payable on demand; what contract does not vitiate.*—The violation of its charter by an incorporated bank, in circulating as currency notes or bills not payable on demand, does not vitiate a contract made by the bank with other parties involving the circulation of such notes or bills.
2. *Contracts involving circulation of Confederate currency; when not void.* Although a loan of Confederate currency is not a sufficient consideration for a promise to pay money, contracts for the sale and purchase of property, involving its use and circulation, are not void.
3. *Contract of sale; what held to be a mortgage.*—A contract purporting to be a sale, by the terms of which the vendee is to sell the property, and out of the proceeds of the sale pay an antecedent debt of the vendor, with interest and expenses, any excess to be returned to the vendor, and any deficiency to be made good by him, is in effect a mortgage.
4. *Bill for discovery; when not without equity.*—A bill in chancery for a discovery and account of property disposed of under such a contract, is not without equity.
5. *Same; what jurisdiction not defeated by.*—The change of the law of evidence which allows the parties to a suit to be examined as witnesses, does not take away the jurisdiction of chancery to compel a discovery.

APPEAL from Chancery Court of Barbour and Henry.
Heard before Hon. B. B. McCRAW.

The facts are sufficiently stated in the opinion.

PUGH & BAKER, and SAM'L F. RICE, for appellant.
SHORTER & MCKLERoy, and JOHN COCHRAN, *contra*.

[No briefs reached Reporter's hands.]

B. F. SAFFOLD, J.—The facts of this case may be stated as follows: The appellant, Thomas J. Cannon, being a dealer in cotton for speculation and profit, received from the Eastern Bank of Alabama, on the 21st of July, 1862, \$12,359 in Confederate treasury-notes, as an advance on

two hundred and twenty-nine bales of cotton. He left the cotton receipts in the possession of the bank, with authority to any agent of the bank to ship the cotton to Liverpool on his risk and account. It was then to be sold, and the net proceeds were to be applied to the payment of the advance and interest upon it to the date of the sale, estimating the pound sterling at \$4.80.

On the 31st of August, 1862, he received from the bank the further sum of \$41,095, in the same currency, on seven hundred and eleven bales, on like terms as the first.

On the 7th of August, 1865, Cannon executed a contract with John McNab, who was the president of the bank, by which he sold to McNab five hundred bales of cotton for \$74,264.93. The consideration of this sale, as expressed in the contract, was, that McNab was to ship the cotton to Liverpool for sale. If the net proceeds of its sale there should over-pay the price above stated, with interest, insurance, and all other expenses added, in Liverpool funds, the excess was to be paid to Cannon. But if the amount realized should be insufficient to pay these several sums, Cannon was to make good the deficiency. McNab was authorized to sell the cotton in New York, if he preferred to do so, and in that event the currency received there was to be estimated at its value in Liverpool funds.

Cannon complains in his bill that so far from realizing the price expressed in his sale to McNab, which was really the amount of his indebtedness to the bank, and the interest, insurance and expenses, by a resale of the cotton, McNab claims a deficiency against him of over \$31,000, and refuses to account to him for what he did with the cotton. He prays for a discovery and account.

The complainant further alleges, that all of these transactions on the part of the bank were done in violation of its charter, and by agreement with the rebel State of Alabama to give value and circulation to the Confederate treasury notes in aid of the late war against the Union. And, in reference to his sale to McNab in 1865, that the latter owns all of the stock of the bank, and is the bank.

A demurrer to the bill for want of equity, and on other grounds, was sustained.

The complainant states the facts of his case, and claims a discovery and account. It is with these that we have to deal. There is no doubt that the bank was forbidden by its charter and by the law of the land to circulate the treasury-notes of the Confederate States. So far as the violation of the charter is concerned, it does not follow that the circulation of these notes as money vitiated the contract between these parties.—*Harris v. Runnels*, 12 Howard, 79. The charter forbids the issuance, for circulation as currency, of any notes or bills not payable on demand. Section 935 of old Code declares, "Every bill of exchange, note, bond, or instrument of any description, whatever may be its form or device, issued with the intent to circulate the same as money, without authority of law, is an absolute, unconditional promise of the association, or person, putting such bill, note or other instrument in circulation, and may be sued on by the holder thereof, without transfer or assignment, and without demand, protest or notice, and the amount thereof recovered, with interest thereon, at the rate of fifty per cent. per annum, from the date thereof, or from the time the same was put in circulation."

On the other point, the ruling of this court has been that, while the loan of Confederate currency is not a sufficient consideration for a promise to pay money, contracts involving its use and circulation are not on that account void.—*Hale v. Houston*, *Sims & Co.*, 44 Ala. 134; *Herbert & Gessler v. Easton*, 43 Ala.

The contract between the complainant and McNab, made in 1865, seems to be an ascertainment of the amount of the complainant's indebtedness, and a more definite expression of the manner in which it was to be paid. It is not an absolute, unconditional sale of the cotton, but is rather a mortgage of it with a power of sale, the mortgagee taking possession of the property for the purpose of sale. The complainant was deeply interested in the disposition to be made of the cotton.

Cannon v. McNab and the Eastern Bank.

The boundaries of equity jurisdiction in matters of account, cognizable at law, is not easily ascertained. Where a discovery is sought, and the discovery is effectual, that becomes a sufficient foundation upon which the court may proceed to grant full relief. When, as in this case, the account has equitable trusts attached to it, there is no doubt of the jurisdiction.—1 Story's Eq. Jur. §§ 454, 455, 456; 1 Story's Eq. Jur. § 64*k*, and notes; *Carlisle v. Wilson*, 13 Vesey, 278-9. We do not think that because our present law of evidence enables the plaintiff to examine the defendant as a witness, his right to proceed in equity is thereby taken away. Besides, as McNab became a trustee for the complainant in the care and disposition of the cotton, it can not be known until his answer comes in what relief the complainant may be entitled to.

The court erred in sustaining the demurrer.

The decree is reversed, and the cause remanded.

NOTE BY REPORTER.—An application for a rehearing was made in this case at the June term, 1871. It was denied at the present term. The application did not come into the Reporter's hands, and he is therefore unable to state the nature of it. Mr. Justice SAFFOLD delivered the following response to the application:

SAFFOLD, J.—We do not see the necessity for any further consideration of the matters involved in this case at this time. The attorneys on both sides are sagacious and discriminating, and we prefer to consider the issues which may arise on another trial after they have been argued.

The application is denied.

GRAHAM *vs.* COOK ET AL.

[BILL IN EQUITY BY PART OWNER OF STEAMBOAT AGAINST OTHER OWNERS AND OTHER PERSONS CLAIMING TO BE OWNERS, TO HAVE COMPLAINANT'S INTEREST THEREIN DECREED TO COMPLAINANT, FOR ACCOUNT OF PROFITS FOR USE OF SAME, AND TO ENJOIN SALE OF COMPLAINANT'S INTEREST BY OTHER OWNERS, AND FOR GENERAL RELIEF.]

1. *General relief; prayer for, what decree authorizes.*—Under the general prayer for relief, of a bill in equity, when in the disjunctive the complainant may receive the relief to which his case entitles him, different from his special prayer, if the defendant will not thereby be surprised.
2. *Part owner of vessel; what interest can sell.*—One part owner of a vessel has no authority to sell more than his own interest.
3. *Hire of boat; when damages by way of, may be properly decreed.*—Where one part owner of a steamboat sold the entire interest to persons chargeable with notice of the rights of the other owner, which they and their vendor deny and repudiate, on a bill filed against them by such owner praying to have her interest established, and an account of the earnings, the defendants can not complain if her proportion of the reasonable hire of the boat during its detention be decreed to the complainant as damages.

APPEAL from the Chancery Court of Mobile.

Heard before Hon. N. W. COCKE.

The record in this case was very large, and imperfectly bound; parts of it became separated from the portion of the record that came into the Reporter's hands. The missing part of the transcript is mainly that part which contains the depositions. It has been impossible, therefore, to give any fuller report of the facts of the case than appear in the opinion.

MANNING & WALKER, and BOYLES & OVERALL, for appellant.

DARGAN & TAYLOR, *contra*.

[No briefs came into the Reporter's hands.]

B. F. SAFFOLD, J.—The bill was filed by the appellant on the 3d of July, 1863. Its prayer is, that the court will decree to the complainant her just share of the steamboat *Reindeer*, with its machinery, furniture, &c., and its earnings, enjoin the defendants from disposing of her share thereof, and grant to her such further or other relief as she may be entitled to.

The defendant Cook, and the other defendants Baldwin & Buckley, to whom he sold the boat on the 23d of March, 1863, deny that she had any interest in the said boat, and the last two claim to be *bona fide* purchasers for valuable consideration without notice.

The evidence leaves no doubt of the complainant's part ownership to the extent of a three-eighths interest, and this the chancellor decreed to her. Up to the date of the sale there was no open and express denial of her interest by Cook, and the boat was legitimately employed in its intended business, with him as captain or master. The profits which had accrued to that time seem to have been expended in paying for the construction of the boat, or debts for which Cook and the complainant were equally liable, except a considerable sum of Confederate currency, which was in the possession of the first clerk, Olds. This fund was retained by Olds, against the wishes of Cook, but on account of his claim to be the sole owner of the boat, at the request of the complainant, and on account of an eighth interest in the boat which he himself claimed, until it became worthless. For this portion of the profits the chancellor decided that there should be no liability, because it was lost as much by the fault of one party as the other. We think he was right. There had been at that time no conversion by Cook of either the boat or the money, and no wrong done by him except his mere claim of sole ownership, which, without the possession or control of the money, could impose no liability upon him.

The sale made by him of the entire interest in the boat was a conversion of the complainant's interest, both by him and the defendants to whom he sold, unless the latter may

escape on their plea of innocent purchase. During the possession of Baldwin & Buckley no actual net earnings realized were proved. And on this account, on the special prayer of the bill, the complainant recovered nothing except her three-eighths share of the boat, which from time and use had greatly depreciated. She insists that under her general prayer she ought to recover what the boat might reasonably have been hired for during the time her part ownership was denied, while the defendants urge that this would be such a departure from the special relief asked as is not justified by the practice of the court. We will first consider this issue on the presumption of a tortious conversion by all of the defendants.

There is no doubt that under the general prayer, other relief agreeable to the case made by the bill may be granted than that which is particularly prayed for.—*English v. Foxall*, 2 Peters, 598–611. In *Heirn v. Mill*, (13 Vesey, 119,) Lord Eldon held that “charges in the bill putting facts in issue that are material, entitle the plaintiff to the relief which these facts will sustain under the general prayer. But he can not desert specific relief prayed, and under the general prayer ask relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the court, maintain that relief.” Under the general prayer the court will not suffer a defendant to be taken by surprise, and permit a plaintiff to neglect and pass over the prayer he has made, and take another decree, even though it be according to the case made by the bill.—1 Dan. Chan. Prac. 449–450. Thus, where a bill was filed by a person in the character of mortgagee praying a sale under a trust to which it appeared he was not entitled, the court would not permit him, under the general prayer, to take a decree that the defendant might redeem or be foreclosed, although it was the relief which properly belonged to his case.—*Parks v. Clinton*, 12 Vesey, 48. In this case the master of the rolls expressed his willingness to suffer the prayer to be changed, though he would not allow the bill to be amended generally. He finally allowed

the plaintiff to amend by adding parties, and praying such relief as he might be advised.

The relief which the court can grant under a general prayer depends to some extent upon its form. Where the complainant is in doubt whether the facts entitle him to the specific relief prayed, or to relief in some other form, his prayer concluding for general relief, should be in the disjunctive. A prayer for *such further relief, &c.*, provides for the extension of the particular relief, adding to it, but consistent with it, and should therefore be in the conjunctive.—*Colton v. Ross*, 2 Paige, 396; *Kendall v. Becket*, 2 Russ. & Mylne, 88; 1 Hoff. Chan. Prac. 49. The usual form of the general prayer is for “such further and other relief in the premises, as the nature of his case shall require, &c.” Story’s Eq. Pl. § 40, note. In this case the general prayer is for “such further or other relief,” &c. From the foregoing may be safely drawn the following proposition: Under the general prayer, when in the disjunctive, the complainant may receive the relief to which his case entitles him, different from his special prayer, if the defendant will not thereby be surprised.

There is no doubt that the complainant might have maintained trover against Baldwin & Buckley for the conversion of her share, if she did not aid in deceiving them as to her interest, as was the case in the *Calais Steamboat Company v. Peel*, 2 Black. S. C. R. 372. She might probably have done so against Cook, though it is not so clear that the sale of the entire ship by one part owner will entitle the others to maintain an action of trover against him.—*Wilson v. Reed*, 3 Johns. R. 175; *Bloxam v. Hubbard*, 5 East, 407; *Heath v. Hubbard*, 4 East, 107. Inasmuch as the complainant had altogether, or so nearly, this remedy at law, and preferred to go into equity for a different relief, there is no authority for a decree of the value of her share, and interest from the time of its conversion.

Cook had no authority to sell the complainant’s interest. The presumption is, that they were part owners and not partners. It is so charged in the bill, and the defendants

deny that she had any interest.—3 Kent's Com. 153. His sale, however, transferred his own interest, and thereby the other defendants became owners. If this sale had been made without the denial of the complainant's right, she would have been entitled to her action of account, and to the decree which was rendered. Is this the full extent of the relief which she should have under the bill, answers and proof?

The evidence abundantly sustains the decision of the chancellor, that she was a part owner of the vessel to the extent of three-eighths. Cook had knowledge of whatever interest she possessed. In respect to the other defendants, Ragland, who, as the agent of Cook, made the sale, testifies that it was consummated on the 16th of March, 1863, that the money was not to be paid until the boat was delivered, which was done on the 23d of March. He is not certain whether the money was paid to him on the 23d or 24th of March. Goodall and Snow testify that notice of the complainant's interest was given to Baldwin & Buckley by them on the 21st of March, and Goodall says Baldwin would not receive a copy from him. The complainant's claim was registered in the probate court office on the 23d of March. The muniments of title possessed by Cook were certain bills of sale given to him by the builders, and temporary enrollments in his name, in the custom-house at Cincinnati and Mobile, all of which were so framed at his own instance, without any authority from the complainant. In the same package with the enrollment at Mobile the complainant caused a notice of her claim to be placed, which is dated January 12th, 1863, and which Colson swears was filed shortly after that date, though he says it might have been one, two, or three months afterwards. The probability, from all the circumstances, is that it was prior to the service of the personal notice on Baldwin & Buckley. From this evidence it is plain that these defendants were not purchasers without notice from one whom the complainant had enabled to deceive them.

If the cause could have been determined within a rea-

Graham v. Cook et al.

sonable time after the bill was filed, the special relief prayed would probably have been sufficient, but several years have elapsed, during which the profits accrued under Cook's management have been wholly lost, the value of the boat so greatly depreciated as to be almost worthless, and the complainant deprived of the privilege of selling her interest, or influencing in any way the disposition and employment of the boat. Those who usurped absolute control of the vessel are able to make no accurate statement of its earnings, but claim that large amounts beyond expenses, for which they regularly received vouchers from the Confederate government, have since become valueless. They do not show that the complainant could not have made any use of her share of them, if it had had been promptly assigned to her. Under these circumstances, shall she be held to such relief only as she would have been entitled to if no wrong had been done her; or shall she be decreed, under her general prayer, such hire as the boat would have been reasonably worth, as damages for the detention of her interest, against all of the defendants. We think the latter is demanded by justice and equity.

The judgment is reversed, and the cause remanded.

NOTE BY REPORTER.—The foregoing opinion was delivered at the June term, 1871, and at a subsequent day of the term, both appellee and appellant applied for a rehearing. The arguments in support of the respective applications did not come into the Reporter's hands. The following response was made:

SAFFOLD, J.—The decree was reversed on the ground that the appellant might have relief different from that which she specially asked. The matters of account were obscured by the other issue in the argument before this court, and we do not think it would be just to attempt to do what the chancery court is so much more capable of doing.

We decline to make the amendment asked.

The appellees also ask a rehearing. The grounds stated in the application were considered in making our decision. The fact that their greater interest in the boat would have given them control of it any how is not an answer to their denial of the appellant's right altogether. Their assumption of entire ownership precluded any influence by her in the employment of the vessel; it deprived her of the privilege of selling her interest, or of making any disposition of the profits to which she was entitled.

A rehearing is denied.

JONES, ADM'RX, vs. WEBSTER ET AL.

[TROVER FOR CONVERSION OF CROPS.]

1. *Future crops; when may be subject of mortgage.*—The crops to be grown on lands leased for three years is a proper subject of mortgage by the lessee to the lessor to secure the rent for the term.
2. *Future crops; mortgage on, when notice though not recorded.*—Where lessees shared their lease with others who were to receive half of the crop to be grown on the premises, and who knew that their copartners were the tenants of another, the latter are chargeable with notice of a mortgage on the crop given by the former to the lessor to secure the rent, although it was not recorded at the date of their contract.
3. *Trover by mortgagee against mortgagor; when will lie.*—Trover will lie in favor of the mortgagee against the mortgagor and his consignee, notwithstanding the mortgage stipulated that on or before the law day the goods were to be shipped by the mortgagor, who retained possession, to a factor of his own selection, who was to sell them for the benefit of the mortgagee, if they appropriate them to their own use, by sale or otherwise, before or after the law day.

APPEAL from the Circuit Court of Hale.

Tried before Hon. M. J. SAFFOLD.

The facts are sufficiently stated in the opinion.

Jones, Adm'rx, v. Webster et al.

GARRETT & HOBSON, for appellant.

COLEMAN & SEAY, *contra*.

[No briefs reached Reporter.]

B. F. SAFFOLD, J.—The appeal is from a judgment of non-suit taken in consequence of the adverse rulings of the court in its charges to the jury. The first count of the complaint is for the conversion of one hundred and thirty-nine bales of cotton, in the form prescribed by the Code for the conversion of chattels. There were other counts in case.

The appellant's intestate, William A. Jones, rented his plantation, called the Stephens place, to H. H. & T. J. Happel, for three years from the 1st of January, 1867. To secure the rent, they executed a mortgage to him on all of the crops of cotton to be grown on the place during the term, besides their stock of mules, implements, and other property. The conditions of the mortgage were, that by or before December 31st of each year of the lease, the mortgagors were to ship the said cotton to such factor in Mobile as they might select, who was to sell it, and out of the proceeds of the sale pay to Jones such amount as was then due for rent. But if the grantors should pay the rent at maturity, the conveyance was to be void.

After the contract of these parties, but before the recording of the mortgage, the lessees contracted with Knight & Booker to farm together on the plantation, on such terms as entitled the latter to one-half of the cotton made in 1867. Whether they had notice of the mortgage or not, they were apprised that their copartners were tenants of Jones. The mortgage was recorded May 24, 1867. During the latter part of that year the appellant, who was the administrator of the deceased lessor, became suspicious that her tenants would not dispose of the cotton as they had undertaken to do, and discovering that they had consigned the cotton crop of the year to Webster & Wilson, factors in Mobile, notified them of her mortgage and her

rights under it. These factors had made considerable advances of money to the lessees, and expected to be reimbursed out of the proceeds of the cotton, though they had taken no lien upon it. They had sold some of it, before they received actual notice of the mortgage, but afterwards sold as much as seventy or more bales and appropriated the greater portion of the money to the payment of their own claims against the lessees. They refused to account to Mrs. Jones for the amount thus appropriated, or the balance in their hands. This is about the substance of as much of the evidence as need be stated. The factors, with Booker & Knight and the lessee, H. H. Happel, were made defendants. T. J. Happel was said to be insolvent. The court charged the jury, at the request of the defendants, that upon the evidence the plaintiff was not entitled to recover on the first count in trover.

When a person actually appropriates the property of another to his own beneficial use and enjoyment, or to that of a third person, it is a direct conversion.—Bouvier's Law Dict. To sustain the action of trover the plaintiff must have had at the time of the conversion a complete property, either general or special, in the chattel, and also the actual possession, or the right to the immediate possession of it.—1 Chit. Pl. 148.

Mrs. Jones succeeded to the rights of her husband, as his administratrix. She became entitled to the cotton on the default in the payment of the rent. It is no objection to her general property in it, or her right to its immediate possession, that the mortgage provided for its sale by a factor to be chosen by the mortgagors.—1 Par. on Contr. 571; *Forbes v. Parker*, 16 Pick. 462; *Gifford v. Ford*, 5 Vt. 532; *Willard v. Rice*, 11 Metc. 493.

Although the mortgagors had the right to send this cotton to Mobile to be sold for the benefit of the mortgagee, and the factors had the right to sell it also for her benefit, yet if it appear that prior to the sale either of them had repudiated her right, and treated the cotton as their own, or for their benefit in opposition to her right, then her right

to its immediate possession attached on account of their breach of duty.—*Tucker v. Magee*, 18 Ala. 99; *Whitlock v. Heard*, 13 Ala. 776; *Rasco v. Willis*, 5 Ala. 38.

As the title of the plaintiff to the property, an immediate right to its possession, and a conversion by the defendant, are sufficient to maintain trover, the factors are bound by the constructive notice given by the record of the mortgage, if they are entitled to notice. Neither are the defendants Knight and Booker purchasers for value without notice, &c., because they knew that the Happels were the tenants of Jones, and that the latter had a lien for the rent by law, if not by contract. They were put upon inquiry. The authorities cited by the counsel for the appellees in respect to the necessity of actual notice, refer to cases where the instruments were not authorized to be recorded.

As to whether the future crops to be grown on the leased premises were a proper subject of mortgage or not, there is not much to be said. Any property which is capable of an absolute sale may be the subject of a mortgage. The line of separation between what is a subject of sale, and what is not, is obliged to be more or less indefinite, and liable to change, according to the custom, opinion and necessity of the people generally.

As far as the judicial decisions go in determining the matter, the illustration of "the next cast of a fisherman's net" is as expressive and significant as any other. The fisherman may sell the next cast of his net, because, being a fisherman, it is his business to have a net, and to cast it within a reasonable time. It is more than probable that he will do so. But another can not sell it, because he has no control over the fisherman, and no reasonable expectation of being able to comply with his obligation. It is only possible that he may do so.

If the mortgagors had undertaken to convey the future crops they might make, without possessing any land upon which to make them, and especially without the contemplation of the immediate acquisition of some, then, certainly, their conveyance would be without operation. In

this case they had the land, and the crops conveyed were to be grown upon it during their possessory interest. The crops were an accretion or addition to the land which might very reasonably be expected to be made.—*Wilson v. Seibert*, Am. Law Reg. vol. 8, N. S., 608; 2 Kent's Com. m. p. 468; 1 Parsons on Contracts, 523; *Morrell v. Noyes*, 3 Am. Law Reg. N. S. 18. They were therefore proper subjects of mortgage. The court erred in the first charge given at the request of the defendants. It is unnecessary to consider the other errors assigned, as what we have said, and the authorities cited, sufficiently declare the law of the case.

The judgment is reversed, and the cause remanded.



REPORTS

OF

CASES ARGUED AND DETERMINED

AT THE JUNE TERM, 1872.

MOODY *vs.* THE STATE.

[INDICTMENT FOR ILLEGAL VOTING.]

1. *Journals of two houses of general assembly; courts will take judicial notice of, for purpose of ascertaining whether a law was passed in accordance with Constitution.*—The journals of the two houses of the general assembly are public records, of which the courts will take *judicial notice*, and if it appear from said journals that an act was not passed according to the forms of the Constitution, it will be declared not to have the force of law.
2. *Same; when act will be declared void.*—Where a bill originates in one house of the general assembly, and is there passed and sent to the other house, and is there materially amended and said amendments are concurred in by the house in which it originated, but when prepared for the signatures of the presiding officers of the two houses the said amendments are omitted, and it is signed by the presiding officers and approved by the governor without said amendments, such bill does not acquire the force of law, and as an act of the legislature is wholly void.
3. *Act to regulate elections, approved February 26, 1872; unconstitutionality of.* The act entitled “An act to regulate elections in the State of Alabama,” approved the 26th of February, 1872, (as the same is published in the book of Acts of 1871-72, p. 15,) never acquired the force of law as a constitutional enactment of the general assembly of this State. The said act as published was never passed by the two houses of the general assembly, and is therefore without any validity as a law of this State, and imposes no legal obligation on any body.
4. *Same.*—The bill, having the same title, which passed the two houses was never signed by the presiding officers of the two houses, and was never submitted to the governor for his approval, and for these reasons never acquired the force of law.

Moody v. The State.

APPEAL from the City Court of Mobile.

Tried before Hon. C. F. MOULTON.

The facts are sufficiently stated in the opinion.

CHARLES E. MEYER, for appellant.—I. It is well settled, that courts will, if necessary, look behind a statute to the legislative records to ascertain whether it has a legal existence.—*Jones v. Hutchinson*, 43 Ala. 721.

In the *People v. Mahaney*, (13 Mich. 481,) the court says: "As the courts are bound judicially to take notice of what the law is, we have no doubt it is our right as well as our duty to take notice not only of the printed statute books, but also of the journals of the two houses, to enable us to determine whether all the constitutional requisites to the validity of a statute have been complied with. The printed statute is not even *prima facie* valid when other records, of which the court must equally take notice, show that some constitutional formality is wanting.—See, also, *State v. McBride*, 4 Miss. 303; *DeBow v. People*, 1 Denio, 9; *Bank of Buffalo v. Spencer*, 2 Denio, 97; *Purdy v. People*, 4 Hill, 384; *Spangler v. Jacoby*, 14 Ill. 297; *People v. Supervisors*, 4 Selden, 317; *Cahoon v. Dodd*, 14 Ind. 347; *Burr v. Rosa*, 19 Ark. 350; *Graves v. Green*, 1 Doug. (Mich.) 351.

These constitutional provisions are obligatory; they are not merely directory.—*Jones v. Hutchinson*, 43 Ala. 721; *The People v. Mahaney*, 13 Mich. 481; *Supervisors v. Heenan*, 2 Minn. 330; *The Ind. Cen. Railway v. Potts et al.*, 7 Ind. 683.

"Looking behind" the printed statute to "regulate elections in the State of Alabama," pp. 15-36 of the Acts of 1871-72, we find that during the session of the legislature of Alabama which commenced on the 20th day of November, 1871, a bill was originated in and duly passed by the house of representatives, and after such passage was duly transmitted to the senate for its action thereon. In the senate the following material amendments to said bill were passed and adopted.—See Senate Journal, session 1871-72, 506, *et seq.*, 522, *et seq.*

1. The first section of said house bill was amended by striking out the words "and precincts."

2. Section thirty-three was amended by adding after the word "election" in the 9th line, the following: "*Provided*, that each challenger who challenges a voter shall, at the close of the election for which he has been appointed or chosen, make out a written report of his challenges during the day, in which shall be stated the names of the voters challenged, a description of his person, and a brief statement of the reasons for which he was made the challenger, and the name or names of the witnesses, if any; which report, when completed, shall be immediately submitted to the county solicitor, who is hereby authorized, and shall, upon the reception of said report, swear said challenger to the contents therein contained, and require his signature to be affixed thereto."

3. The thirty-fifth section was amended by striking out the words "any member" in the second line, and by inserting in lieu thereof the words "a majority."

Other material amendments were made to the said house bill by the senate, as will appear by reference to the records of the senate. The bill, with the amendments, was then returned to the house by the senate, for its action thereon, and the house concurred in the amendments of the senate and duly notified the senate of its concurrence in the amendments, and of the passage of the bill as amended by the senate.—Senate Journal, sessions of 1871–72, p. 541.

The bill, as passed by the senate and house, was not properly engrossed and enrolled, but certain of said amendments, including those above set out, which had been made to the original bill by the senate and adopted by the house, were omitted, and said bill, thus erroneously engrossed and enrolled, was signed by the speaker of the house and president of the senate, and approved by the governor and published as the law in the printed acts of 1871–72; and it is for a violation of a provision of this bill (section 39 thereof) that the defendant has been indicted, tried and

convicted, and sentenced to the penitentiary for the term of two years.

"A bill only becomes a law when it has gone through all the forms necessary to give it validity."—*Jones v. Hutchinson*, 43 Ala. 721.

This bill has not gone through the forms made necessary by section 15, of article IV, of the Constitution, because it was not passed by both, or either, houses of the general assembly, as is therein required. It has, therefore, not become a law. The bill that was passed by the two houses of the general assembly was not signed by the speaker of the house or president of the senate, nor approved by the governor. The bill which was signed by the respective officers of the two houses, and approved by the governor, never passed the two houses of the general assembly. The bill, as passed by the two houses, and the bill approved by the governor, are widely variant in substance and in legal effect.—See 2d head-note in *Jones v. Hutchinson*, *supra*.

II. The act is repugnant to, and inconsistent with, section 2 of article 7 of the Constitution. That section declares what persons shall be deemed electors in this State, in these words: "Every male person, born in the United States, and every male person who has been naturalized or legally declared his intention to become a citizen of the United States, twenty-one years old or upwards, who shall have resided in the State six months next preceding the election and three months in the county in which he offers to vote, except as hereinafter provided, shall be deemed an elector."

Yet, though a person possessed all the qualifications which the constitution prescribes, and might therefore be deemed an elector by the constitution, section 36 of the act in question would deprive him of the power to exercise the right of an elector, and to vote, unless he had resided *three months* in the precinct in which he offers to vote. By section 36 of this act, when a person offering to vote is challenged by one of the challengers provided for in said act, he is required to take a certain oath therein set out, in

which he must swear that he has resided three months in the precinct. If he does not take this oath he can not vote. The Constitution declares that certain persons shall be deemed electors. The act attempts to prescribe other and additional qualifications than those prescribed in the constitution. Those whom the Constitution declare shall be entitled to vote, the act deprives of that power. In thus prescribing additional qualifications for electors than those laid down in the Constitution, the legislative branch of the government exceeded its powers. The act is inconsistent with, and repugnant to, the Constitution, and is therefore invalid.—*Dorman v. State*, 33 Ala. 216.

JOHN W. A. SANFORD, Attorney-General, *contra*.

PECK, C. J.—At the June term of the city court of Mobile, 1872, the defendant, John Moody, was indicted under section 39 of the act entitled “An act to regulate elections in the State of Alabama,” approved February 26, 1872, as the same is printed in the published book of Acts of 1871–72, p. 15, was tried and convicted, and sentenced to be imprisoned in the penitentiary for the period of two years.

The defendant appeals to this court, and by the written agreement of the State, by its solicitor, Alexander McKinstrey, by whom the said indictment was preferred, and who prosecuted for the State in said court and tried the said cause, and by the defendant and his counsel, the record is filed and the cause submitted for the decision of this court, as though the appeal had been taken to the present term.

The defense made in said city court was, that the said act had not the force of law, because the said act as published was not passed by both houses of the general assembly, as required by section 15, article IV, of the Constitution; and that the bill, having the same title, which passed both houses was never signed by the speaker of the house and president of the senate, and was not presented to the

governor for his approval, &c. ; that the said bill, as it passed the two houses, is materially variant in substance and legal effect from the said published act.

We are gratified to know that the question here presented is not one of first impression in this court. The same question, in all essential respects, arose in the case of *Jones v. Hutchinson*, and was decided by our immediate predecessors at the June term, 1868, and is reported in 43 Ala. 721.

In that case the court say, "It is undeniably true, that a bill becomes a law *only* when it has gone through all the forms made necessary by the Constitution to give it validity."

The court also say, that the bill in that case, which was signed by the speaker of the house and president of the senate, and which, after being so signed, was presented to and approved by the governor, was not the bill which had been passed by the two houses; that the bill which was passed by the two houses was never signed by the speaker and president of the respective houses, and was never presented to the governor for his constitutional action thereon. It was also said in that case to be well settled, that the courts could, and if necessary would, look behind the printed statute to the legislative records to ascertain whether it had a legal existence.

Now, on examination of the legislative records in this case, (the journals of the two houses,) we find that the bill "to regulate elections in the State of Alabama," originated in the house, and was there passed, substantially, in the form of said published act, and on the 14th day of February, 1872, was sent to the senate without being engrossed. Senate Journal, p. 458.

That on the 20th day of said month the said bill was there taken up, read twice forthwith, under suspension of the constitutional rule, and made the special order for 11 o'clock on the next day. On that day the senate entered upon the consideration of said bill, and some twenty-five or thirty amendments were made to the same, materially

changing the character and legal effect of said bill, and on the 23d day of said month said bill, so amended, was read the third time and passed.—Senate Journal, p. 524.

On the 24th day of the same month the said bill, as amended by the senate, was taken up in the house of representatives, and all the amendments of the senate were concurred in and passed by said house.—House Journal, page 560.

After this, in preparing the said bill to be signed by the presiding officers of the two houses, and to be presented to the governor, &c., whether from carelessness or from some cause less excusable, the said amendments, or the most material of them, were left out and altogether omitted in the engrossed or enrolled copy thereof, and, with said omissions, was signed by the speaker and president of the senate, sent to and approved by the governor, as the bill which had passed the two houses respectively.

These facts being established by the journals of the two houses, the said bill, so signed by the presiding officers of the two houses and approved by the governor, and published in the said book of acts, never acquired the force of law.—Sections 15 and 16, article IV, of the Constitution. It is, as a law, wholly void, a mere nullity, and imposes no legal obligation on any body. Mr. Cooley, in his book on Con. Lim., p. 135, says, speaking of legislative proceedings, "Each house keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take *judicial notice*. If it should appear from the journals that any act did not receive the requisite majority, or that in respect to it, the legislature did not follow any requirement of the Constitution, or in any other respect the act was not constitutionally adopted, the courts may act upon the evidence, and adjudge the statute void."

On the authority of this author, and the cases cited by him, and on the case of *Jones v. Hutchinson*, *supra*, we have no hesitation, and we feel it our bounden duty, to declare the said act "to regulate elections in the State of Alabama," as it is published as aforesaid, altogether void; and that

Miller v. The State.

the said bill, as it passed the two houses, never having been signed by the presiding officers of the two houses, nor approved by the governor, never acquired the force of law.

The said act being void, it follows, that the indictment under which the defendant was convicted is also void, and the sentence and judgment of the court on the same are erroneous and must be reversed, and the defendant discharged.

The clerk will certify the judgment in this behalf to the city court of Mobile, with instructions to discharge the defendant out of custody.

MILLER vs. THE STATE.

[INDICTMENT UNDER SECTION 3621 OF THE REVISED CODE, FOR KEEPING OR EXHIBITING GAMING TABLE.]

1. *Keno*; when within purview of § 3621 of Revised Code.—The game called “keno,” when kept or exhibited by one person, that all who desire to do so, may gamble at it, is, within the purview and meaning of section 3621, Revised Code, to be regarded as a table for gaming.
2. *Same*; who interested within the meaning of.—A party who has a place in the room where the said game is exhibited and carried on, and sells to the persons who play at said game, the cards which are used in playing the same, is, within the meaning of said section 3621, interested or concerned in keeping or exhibiting a table for gaming.

APPEAL from the Criminal Court of Dallas.

Tried before HON. GEO. H. CRAIG.

The opinion states the case.

REID & MAY, for appellant.—A gaming table is defined by Webster to be “a table appropriated to gaming,” and by the witnesses examined in the lower court to be a game

whose proprietor is the banker, and against whom and whose bank the bets are made.

The second section of the act of 1812, Aikin's Dig. 210, prohibited the keeping, &c., of any gaming table, commonly called A. B. C., or E. O., or Roulette, Rowley Powley, or Rouge and Noir, or any faro' bank, or any other gaming table of the same or like kind, or of any other description, under any other denomination whatsoever, &c. The first section of the act of 1826, inhibited the granting of a license "to keep, or cause to be kept, any table, bank or other invention, by whatever name known or called, used for gaming, &c."—Aikin's Dig. 212.

The fourth section of the act of 1828 prohibited the "keeping or exhibiting any gaming table called A. B. C., or E. O., or Roulette, or Rowley Powley, or Rouge and Noir, or shall keep or exhibit any faro bank or other gaming table or bank of the like kind, or of any other description, under any other name," &c., &c.

Section 3249, Code of 1852, "any person who keeps or exhibits any gaming table," &c.

Section 3621, Revised Code, "any person who keeps, exhibits, or is interested or concerned in keeping or exhibiting, any table for gaming of whatsoever name, kind or description, not regularly licensed under the laws of this State, must," &c.

It is submitted that under the foregoing definitions, the game of "keno" can not be embraced in either of the statutes referred to.—Monarch's case, 6 Bush, (Ky.) 301; Jackson's case, 3 Denio, 101; Mann's case, 2 Oregon, 238; Harbaugh's case, 40 Ill. 294; Hall's case, 3 Broom, (N. J.) 158; Davis' case, 20 La. Ann. 354; Tate's case, 21 Tex. 202.

If defendant's offense is violative of any statute, it is of section 3616, Revised Code. The evidence satisfactorily shows that keno is not a gaming table, or a table for gaming, but is a lottery.

Keno was licensed, see subdivision 2, section 112, p. 331, acts 1868; also, subdivision 7, section 5, p. 268, acts 1867.

The framers of sections 3621 and 3622 certainly concluded that "a game called keno," was not embraced in section 3621.—(See Revised Code.) "*Inclusio unius est exclusio alterius.*"

"The words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted;" and where the intention of the legislature is doubtful the inclination of the court shall always be against that construction which imposes a burthen on the subject.—Broom's L. M. 366.

Sir E. Coke observes: It is a true principle that reference should be made to a subsequent section, in order to explain a previous clause of which the meaning is doubtful.—Co. Litt. 381, A.

The lower court erred in its charge that "keno" was a gaming table, and prohibited by section 3621.

The court could not *judicially know*, since the statute failed to name it, that keno was a gaming table.

JOHN W. A. SANFORD, Attorney General, *contra*.—Any person who keeps a table and sells cards used in the game of keno, and at which the purchasers of the cards bet, is guilty of a misdemeanor.—Revised Code, § 3621; *Whitworth v. The State*, 8 Post. 434-40; *State v. Red*, 7 Rich. (S. C.) 8; *Crow v. The State*, 6 Texas, 334; *McGowan v. The State*, 9 Yerg. 184.

To bet at keno is a misdemeanor.—Code, § 3622. What reason can be given for the impunity of a person who has the table, upon which the cards are placed, by the gambler, after he has purchased them for the game, and who sells the cards and receives a certain per cent. of the stakes? Certainly, section 3621 is sufficiently broad in its language to include such a table.

PECK, C. J.—The appellant, defendant below, was indicted in the criminal court of Dallas county, for keeping or exhibiting a gaming table for gaming, or being interested or concerned in the keeping or exhibition thereof.

The indictment was preferred under section 3621, R. C., which is as follows, to-wit: "Any person who keeps, exhibits, or is interested or concerned in keeping or exhibiting, *any table for gaming*, of whatsoever name, kind or description, not regularly licensed under the laws of this State, must, on conviction, be fined not less than one hundred, nor more than one thousand dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than twelve months."

The defendant was tried on the plea of not guilty, convicted, and fined one hundred dollars. A bill of exceptions was taken by the defendant, in which all the evidence is set out, with the charges given by the court and excepted to by the defendant, and one charge asked by the defendant, which was refused to be given, and he excepted, &c.

Two witnesses, only, were examined, one by the State, and the other by the defendant, both of whom seem to have been adepts in the pernicious art of gambling.

The witness for the State stated that in March or April, in the year 1871, he was in a room in the rear of defendant's store, in east Selma, Dallas county; that while in said rear room, at said time, he engaged in a game called "*keno*;" that he purchased from defendant a card for the purpose of playing said game, and paid to him the price of said card, which was twenty-five cents; that defendant did not take any further part in said game of keno, except to receive from said witness the money for said card. The wheel was turned by another person. That witness, with said card, played at said game of keno, in said room, at the time mentioned; that witness won and lost at said game. The game of keno is played in the following manner: There are ninety ivory balls or marbles, numbered from one to ninety, which are placed in an oblong wheel, which has a valve in the smaller part, and there are a number of cards, upon which is printed three lines of figures, each line having five numbers. These lines are combinations of numbers, from one to ninety. At the

beginning of the game, each of the players purchase one of these cards, at a price mutually agreed upon, and the money paid by the players, for these cards, constitute the pool to be played for, by the purchasers of cards. The balls are carefully examined, and placed in the wheel, by the person who runs the game, or the conductor of the game. The wheel is turned several times, and the valve, at its smaller part, opened, and a ball drops out, and its number announced by the person who runs or conducts the game. The player, who has the number announced, places a button on that number, on his card. The wheel is again turned, a second number is proclaimed, which is noted in the same manner, by a button as the first, and thus the numbers are continued to be drawn, until some person cries "keno," which means that the five numbers, upon one of his lines upon his card, have been drawn. The card of the player is then submitted to the conductor of the game, who examines it, and if found correct, the player receives the pool, less the per cent. taken by the person who runs or conducts the game, which is from ten to fifteen per cent. of the amount of the pool. This is the end of the game. The balls are returned to the wheel, the players purchase again a card, and the play goes on as before. The game, which he has described, is called "keno," and was the game he played as stated, when the defendant collected from him the price of the card. The defendant collected the money from other players, at the time witness played said game, and on several other occasions the defendant did the same, and he never saw any other person attending to said collections at said place.

The witness for the defendant testified that he was well acquainted with the game called "keno;" that the proper name of said game was "loto." In America it was known as "keno," and that he had heard the game called ninety-number lottery; that he had heard the witness for the State describe said game, and that his description of the same was correct. He said, at the game called keno, several persons could win in the same game, at the same time;

that in said game there was no fund staked by the conductor or manager of the game, against the players; that in said game, the fund that was played for, was the aggregate amount received in the game from players for cards, less the amount of commissions, deducted by the conductor or manager of the game, which was from ten to twenty per cent. of the amount so received.

This witness was not present at the time of the playing testified to by the witness for the State, and the remainder of his evidence consists mainly in describing the difference between the game called keno, and what he called a seventy-eight number lottery, and does not seem material to the understanding of this case, and I omit to state it. I will add, however, that he said the game of "keno" was not recognized or known as a table for gaming, by sporting men; that faro, roulette, rouge et noir, and other games, where the table, or game, or conductor of the same, has always a fund against which the player may hazard his money, are recognized and known generally as tables for gaming, or gaming tables.

After the evidence was closed, the defendant requested the court to give his charge to the jury in writing, which was done. I will not prolong this opinion by setting it out; it in substance amounts to this: That such a game as that described by the witnesses as "keno," came under, and was included in tables for gaming, prohibited by section 3621, R. C., under which the indictment was found; that in an indictment under said section, it was not necessary to allege or prove that any money was bet; that if, after considering all the evidence, they had a reasonable doubt of the defendant's guilt, he should be acquitted.

The solicitor asked the court to give three charges, varying in words, but equivalent to this: That if the defendant kept or exhibited, or was interested or concerned in keeping or exhibiting, the game called keno, described by the witnesses, they should find him guilty.

These charges were given and the defendant excepted.

The charge asked by the defendant, although very badly

expressed, I understand to mean this: That if the jury believed, from the evidence, that the defendant only kept, or exhibited, a game called keno, or was interested or concerned in the keeping or exhibiting, a game called keno, he could not be found guilty. This charge the court refused, and defendant excepted.

1. There being no conflict in the evidence, it was the duty of the court to determine, and to instruct the jury, whether keno, the game played, as it was shown to be played in this case, within the purview and meaning of section 3621, R. C., was a table for gaming. In my opinion it was, and that the court committed no error in so instructing the jury.

Whenever a game is kept or exhibited by one person, who is said to *run the game*, who is the conductor or manager, and presides over the same, and it is carried on by means or instruments, as in this case, by a wheel, balls, cards, &c., that necessarily require the use of a table, or something in the place of it, and is kept or exhibited that third persons may gamble at it, whatever be its name or description, it is a table for gaming, or a gaming table, within the meaning of said section 3621.

The legislature wisely, and, as I think, intentionally, omitted to give any name or description to any table or tables for gaming, but have employed language comprehensive enough to embrace all, lest, if names and descriptions had been given, the cunning and devices of men might, thereby, evade the law, and escape its just penalties. We, therefore, decide that the game called keno, as it was kept and exhibited, in this instance, is to be regarded as a table for gaming.

2. Was the defendant interested or concerned in keeping or exhibiting said table for gaming? The jury, under what we hold to be proper charges, have found, and we think correctly, that he was.

As there was no error in the charges given, there was none in refusing the charge asked by the defendant.

Let the judgment be affirmed at appellant's cost.

HORST, MAYOR, &C., ET AL. *vs.* MOSES, ET AL.

[BILL IN EQUITY TO ENJOIN INVASION OF FRANCHISE, &C.]

1. *Act to establish Mobile Charitable Association, &c.; what right did not confer.*—The act of the General Assembly of Alabama, entitled “an act to establish the Mobile Charitable Association, for the benefit of the common school fund of Mobile, without distinction of color,” approved December 31st, 1868, does not authorize the “partnership association,” therein mentioned, to keep or exhibit a table for gaming. The awards and distributions, authorized by said act, can not be determined by means of the “roulette wheel,” or by the use of the “oblong box and balls,” used in the manner that “keno” is usually played; such a method of distributing awards is not authorized by said act. (*By all the Judges.*)
2. *Act to establish Mobile Charitable Association; unconstitutionality of.*—The act to establish the Mobile Charitable Association, &c., approved December 31st, 1868, is repugnant to article IV, section 2, of the State constitution, for variance between the subject of the act and that expressed in its title. It is also violative of article I, section 32, of the State constitution, because it confers an exclusive privilege on the partnership. (PETERS, J., *dissenting.*)
3. *Power of General Assembly to confer exclusive privileges; test of.*—The test of the power of the legislature to confer franchises on particular individuals is, whether the privilege conduces to the public good, and is such as must be committed to a few in order to be available.

- PECK, C. J., held, 1. That the act of the 31st December, 1868, did not create a contract between the State and the parties and their associates named in said act, but was a mere proposal that only became a contract on the payment of the sum named in the second section of said act.
2. That such contract was not a contract for the period of ten years, but for one year only, from the date of said payment.
 3. That as it was at the mere option of said parties and their associates, at the end of the year to renew, or not to renew said contract, the State had the same option to withdraw her proposal and to repeal said act.
 4. That as the State repealed said act on the 8th of March, 1871, book of acts, p. 217, when no contract, in fact, existed between her and said parties and their associates, the payment made by them to the superintendent of common schools of the county of Mobile, after the repeal of said act, was a payment made without authority of law, and did not authorize them to do business under said act of the 31st of December, 1868.
 5. And if, after the repeal of said act, they proceeded to do business under the same, and in doing so violated the laws of said city of Mobile against

Horst, Mayor, &c., et al. v. Moses et al.

gaming, then they were liable to be prosecuted for such violations, in the same manner as other persons for like offenses.

- PETERS, J., in an opinion concurring in the judgment rendered, but dissenting from the reasoning employed by the majority, held, 1. That the act of the 31st December, 1868, creating the "Mobile Charitable Association," grants a "franchise" to "I. C. Moses & Co." and their "associates," upon valuable consideration. This is a contract, which the legislature can not impair by a repealing act.
2. That the 32d section of the first article of the State constitution does not affect this act. That section forbids the grant of "hereditary" franchises and privileges only, not merely exclusive privileges for a limited time.
 3. That the *thirteenth* article of the constitution on "corporations," is not intended to apply to such a grant as this. It controls a "general law of incorporations," or "special laws passed pursuant" to that article.
 4. That the title of the act contains but one subject, which is clearly expressed.

APPEAL from the Chancery Court of Mobile.
 Heard before HON. ADAM C. FELDER.

This was a bill in equity, filed by the appellees, J. Clifton Moses and Eugene Beebe, against the mayor, aldermen and common council of Mobile, Martin Horst, mayor, R. M. Quinn, chief of police, and McPhillips and Kassens, assistant chiefs of police, praying that the defendants be perpetually enjoined and restrained from interfering with or disturbing complainants in the enjoyment of the franchise and privileges which enured to them, or in carrying on the business which complainants alleged they were entitled to prosecute, by virtue of the following act of the general assembly of Alabama:

"An act to establish the Mobile Charitable Association, for the benefit of the common school fund of Mobile county, without distinction of color.

"SECTION 1. *Be it enacted by the General Assembly of Alabama,* That I. Clifton Moses and Fred. H. Fowler of Mobile, Alabama, and Eugene Beebe of Montgomery, Alabama, and their associates as partners, shall have the full right and authority to form themselves into a partnership association to be known under the firm name and style of "I. C. Moses & Co.," or such other name as they may de-

signate, for the purpose of receiving subscriptions and to sell and dispose of certificates of subscription which shall entitle the holder thereof to such prizes as may be awarded to them, which distribution of award shall be fairly made in public, by casting of lots, or by lot, chance, or otherwise, in such manner as to them may seem best to promote the interest of the school fund of Mobile county, which said distribution of award and prizes shall be made at their office in the city of Mobile, or such other place or places in the State as they may direct.

“SEC. 2. *Be it further enacted*, That before commencing business under the provisions of this act, said parties shall pay or cause to be paid to the board of school commissioners of Mobile county, for the use of the public schools of said county, the sum of one thousand dollars, and annually thereafter a like amount, for the term of ten years, or so long as said partnership shall choose to do business under the provisions of this act. It being understood and agreed, that said payment of one thousand dollars per annum by said partnership to said common school fund, is the consideration upon which this privilege is granted; and whenever said company shall fail to pay said sum, according to the provisions of this act, then, and in that case, their right to do business shall cease.

“SEC. 3. *Be it further enacted*, That during the time business shall be done under the provisions of this act, the same shall be exempt from taxation, except for State purposes.

“SEC. 4. *Be it further enacted*, That this act shall remain in full force and effect for ten years, upon the consideration herein contained, during which time said partnership company shall have the right to exercise the privilege and franchise herein given, any law to the contrary notwithstanding.

“Approved December 31, 1868.”

The bill then states facts showing a compliance on the 2d of February, 1869, with the requirements of said act, and the facts alleged as an excuse why the last of the an-

nual payments was not made. The statements of the bill as to the non-payment of the last annual payment of \$1,000 were denied in the answer, which alleged that the complainants had forfeited their franchises by this failure; but as the case did not turn on this point, it is unnecessary to refer further to the matter of this payment.

It is further alleged in the bill, that complainants had expended large sums of money in carrying on, and in preparing to carry on their business, and to comply with the requirements of said act. The bill then alleges, that in pursuance of their business, "as they were authorized by the said act, and conducting their said business in strict and entire accordance with the terms of and provisions of last said act, that, in pursuance of their said business, they sold and disposed of certificates of subscription, which, by the terms thereof, and in fact, entitled the holders thereof to such prizes as might be awarded to them in the casting of lots as aforesaid, and that the distribution of awards was in each case made fairly in public by the casting of lots. That, for the purposes aforesaid, they adopted the means or contrivance of what is called a roulette wheel and ball as the lot or chance, which to them seemed best to carry out the objects and purposes of last said act. That the roulette wheel is a revolving circle with a number of holes attached thereto, each of which is numbered, and the wheel is revolved in one direction and at the same time a ball is thrown revolving upon, and inside of said wheel in the opposite direction from that in which the wheel is revolved, and when the ball settles down in any one of the holes, the number attached to that hole is entitled to a prize; and that they have in all cases cast lots as aforesaid, and in the manner aforesaid fairly and in public, and made such distribution of awards and prizes fairly, and in public, and that in each case of said casting of lots as aforesaid, there was only one set of said certificates sold or disposed of for each of said castings of lots as above said and described." It is further alleged in the bill "that, in addition to the wheel and ball as above stated, they also

at times, since December, 1870, used and are still using another method of determining by lot or chance the prizes in their said business, of the following character: In an oblong box are deposited ninety balls, each numbered from one to ninety; printed certificates of subscription are issued to purchasers, each certificate containing three rows of numbers, five in each row; the number of certificates are numbered from one to one hundred and ninety-two, inclusive, and the purchaser of the certificate selects any number of the certificate he desires; each certificate has different figures from every other certificate. The oblong box is revolved and a ball is thrown out; the box is again revolved and another ball thrown out, and so on successively until the numbers on the balls so thrown out correspond with all the numbers in one of the rows on some one of the certificates, and when this occurs, the holder of such is entitled to the prize designated, and thus awarded; and that in each and every instance in the casting of said lots, either by said roulette wheel and ball, or by the oblong box and balls as aforesaid, the same has been conducted fairly and in public, and the distribution of the awards so made and ascertained has been fairly made in public; and that the selection of said modes of determining the prizes and the distribution of the same, was made by your orators as the modes of lot or chance to determine the same, because these modes seemed best to your orators to promote the object of the first said act, and that the mode adopted as aforesaid by the use of the oblong box and balls, is upon the same principle as the game called keno is played or carried on."

The bill further states facts showing that on divers days in April and in June, 1870, and also in August, 1871, one of complainants and several of their agents had been arrested by the police officers of the city of Mobile, and, as they alleged, under authority of the laws and ordinances of the city of Mobile, on the ground that complainants and their agents, in carrying on said business, were violating the ordinance of the city of Mobile against exhibiting a

Horst, Mayor, &c., et al. v. Moses et al.

gaming table. The bill further alleges, that said police officers had arrested various persons attending the drawings had by complainants in carrying on their said business, and that the police officers and city authorities had repeatedly avowed their determination to arrest complainants and their agents, and would in the future continue to arrest them, upon the alleged ground that the business carried on by complainants and their agents was not authorized by the charter, and was in violation of the city ordinances against exhibiting gaming tables, &c.

The bill also alleges, that by reason of the arrests, annoyances, and hindrances above referred to, many persons had been prevented and were prevented from purchasing tickets at complainants' drawings; that complainants' business has been greatly injured thereby, they having been at great expense in preparing to carry on the same; that by reason of the arrests, &c., complainants have been damaged in their business, and put to great expense and sustained large losses, and their business nearly broken up; that if the city authorities and police officers continue to disturb and hinder complainants, and arrest them and their agents and persons who attend the drawings, as complainants charge that defendants will, and as they likewise avow, complainants' business will be utterly broken up and destroyed, and their franchise and the privileges conferred by said act rendered utterly valueless.

It is further alleged in the bill, that the police officers who made the arrest referred to, have not more property than is by law exempt from levy and sale on execution. The bill sets out that portion of the charter of the city prescribing by whom and in what manner arrests may be made for the commission of any public offense or violation of any city ordinance within the limits of the city of Mobile, and alleges that the mayor, aldermen and common council, and the police officers making or ordering the arrest of complainants and their agents, or of persons purchasing certificates of subscription in complainants' drawings, as before detailed, would not be liable to complain-

ants for the damage and losses complainants have already sustained, and would sustain, by reason of the ordering and making of such arrests, inasmuch as defendants would be exercising judicial power, or power in its nature judicial, and in making such arrests themselves, if sued therefor for false imprisonment, could and would allege that they had reasonable grounds for such arrests, and would therefore be free from responsibility for such arrests. The bill further alleges "that unless complainants are protected by the court of chancery, they will be damaged to an extent and in a manner that can not be estimated at law;" "that their business is of that character which depends upon the number of certificates of subscription purchased in their business, and it will be impossible to make any estimate thereof to any certainty by legal evidence, and for that reason no possible remedy at law can compensate them therefor, even if they could sustain action at law and recover damages for such interference and disturbance of their said business."

The mayor, aldermen and common council, Martin Horst, mayor, and the persons holding the offices of chief of police and assistant chiefs of police are made defendants. Complainants also prayed for the issue of a writ of injunction "directed to said Martin Horst, as mayor aforesaid, enjoining and restraining each and every member of the police force of said city, through him, the said mayor, as the head thereof, from interfering with or disturbing your orators, in the carrying on of their said business, either in the use of the scheme of the roulette table and ball, or in the use of the scheme of the revolving oblong box and balls, on the principle of the game called keno; or in the sale of their said certificates of subscription in either of said schemes, or disturbing any of their agents employed in carrying on their said business on the plans of either of said schemes, either by arresting your orators or any of their said agents, on the charge or pretense of violating thereby, any ordinance of said city against gaming or against exhibiting a gaming table, either for any past or

Horst, Mayor, &c., et al. v. Moses et al.

future acts done by them or their said agents, in carrying on their said business as aforesaid, on the several schemes as aforesaid, or otherwise disturbing them therein."

There was also a prayer for a similar injunction against interference with persons who had become or might become holders of certificates of subscription, &c., and that on the final hearing the injunction prayed be made perpetual.

Sworn answers to the bill were waived.

Application for an order for the issuance of injunction was made to a circuit judge, who granted the order, and upon complainant's complying with the conditions prescribed in the *fiat*, the injunction issued as prayed for.

The defendants all answered. The answers allege that the act under which complainants claim to carry on their said business was unconstitutional and void; that the privileges which said act purports to grant are privileges not enjoyed by, and which it is not lawful for, the citizens of Alabama at large to enjoy; but that, on the contrary, the citizens of Alabama at large are by its penal laws expressly forbidden to enjoy such privileges, and that the exercise of such privileges are forbidden within the limits of the city of Mobile by the ordinances thereof.

It is admitted that complainants, after the passage of the act, begun the business of carrying on a lottery, but the respondents distinctly deny that complainants did this "under the provisions of and strictly in accordance with the terms of said act; and say that, on the contrary, they disregarded and failed to perform at the very outset the conditions imposed on them by said act, as the consideration thereof; and respondents insist that without the performance of said considerations, according to the terms of said act, no rights passed to complainants under said act, even if the said act were constitutional. Respondents say that complainants and their associates have not confined themselves to the business of carrying on a lottery, as contemplated by said act, but have abandoned the business of keeping and carrying on a lottery only, and have persist-

ently and cunningly evaded the spirit, letter, and intent of said act, by various devices, and have set up, established, operated, kept, and carried on, in the city of Mobile, various devices which are not lotteries; and among them the device of roulette wheel and ball, and also the device known as keno, which are common gamblers' devices and gaming tables, and not lotteries, and which are other than and different in substance from the lottery device first established by them as aforesaid; and respondents say that complainants, under pretext of cover by said act, have set up, kept, and maintained several gambling dens in the city of Mobile, at various places, wherein the said gambling table and device are kept, and which the public is allowed and invited to game for money, greatly to the demoralization of the citizens of Alabama."

The answers also set up facts, to show that complainants had forfeited their franchise by non-payment of one of the annual payments, required by the act, and denying validity of excuses for such non-payment as set up in the bill; but as this part of the case had no material bearing upon the decision, it is not necessary to allude further to it.

In the answers, an elaborate and detailed account is given of the mode and manner in which complainants carry on their business. Drawings and exhibits are attached to the answers, to show that the scheme of drawing and mode of carrying on the business was but a "cunning device to carry on gaming, and to promote the avaricious purposes of complainants to their own profit, without any regard to the objects or purposes of said act, or the benefit of the common school fund of Mobile county." It is also alleged that "the device of a roulette wheel and ball, is not, truly speaking, a lot or distribution of awards, but that the same is a common gambler's game, well known by gamblers, and in use by them as a gaming table in almost all the gambling dens in Europe and America."

It is impossible, without greatly and improperly lengthening the report of the case, to give a more extended syn-

Horst, Mayor, &c., et al. v. Moses et al.

opsis than has already been given, of the minute and lengthy description in the answer of the mode and manner in which complainants carried on their business.

The arrests are admitted, and a purpose avowed to continue them in all lawful modes, to break up what respondents state they are advised is but a mere cover or device for carrying on gaming, and a violation of the laws of the State and the ordinances of the city.

On the 8th of March, 1871, the General Assembly of Alabama passed the following act :

“An act to repeal an act entitled ‘an act to establish the Mobile Charitable Association for the benefit of the common school fund of Mobile county, without distinction of color.’

“SECTION 1. *Be it enacted by the General Assembly of Alabama,* That an act entitled ‘an act to establish the Mobile Charitable Association for the benefit of the common school fund of Mobile county, without distinction of color,’ approved December 31, 1868, be, and the same is hereby repealed.

“Approved March 8, 1871.”

The respondents (appellants) also demurred to the bill on the following grounds :

“1. That there is no equity in the said bill.

“2. That said bill shows on its face that complainants have not complied with the terms and conditions upon which the privileges, which the said act of 31st December, 1868, purports to give them, were granted.

“3. That said act of December 31st, 1868, is repealed.

“4. That said bill seeks to enjoin Martin Horst, as mayor of Mobile, and through him the police force of Mobile city, from the exercise of powers conferred on them by law.

“5. That said bill, in effect, seeks to enjoin and restrain the mayor of Mobile, sitting in, and holding, and presiding over, the mayor’s court of Mobile, from exercising the quasi-criminal jurisdiction conferred on him by law.

“6. That said bill seeks to enjoin and restrain the Mayor of Mobile from exercising the duties and authority con-

Horst, Mayor, &c., et al. v. Moses et al.

ferred on him by law, as ex-officio justice of the peace and magistrate.

"7. That said bill seeks to enjoin a trespass.

"8. That said bill shows that complainants have an adequate remedy at law.

"9. That the chancery court has no jurisdiction of the case made by said bill."

The bill was filed August 17th, 1871.

The appellants, on October 17th, 1871, made a motion in vacation to dissolve the injunction, "upon the denials in the answer, and the demurrers filed and for want of equity," which motion was overruled by the chancellor.

The appellants appealed from the order refusing to dissolve the injunction, and here assign the same as error.

R. H. & R. J. SMITH, and THOS. H. HERNDON, for appellants.

O. J. SEMMES, JNO. A. ELMORE, and SAM'L F. RICE, *contra*.

[The Reporter has been unable to obtain any of the briefs in this case.]

The Judges delivered opinions *seriatim*.

PECK, C. J.—The act of the 31st of December, 1868, (book of Acts, &c., p. 511,) entitled "An act to establish the Mobile Charitable Association, for the benefit of the common school fund of Mobile county, without distinction of color," did not create a contract between the State of Alabama and I. Clifton Moses and Fred. H. Fowler of Mobile, Alabama, and Eugene Beebe of Montgomery, Alabama, and their associates. It was a proposal merely, that would become a contract when accepted by them, and paying to the board of school commissioners of Mobile county, for the use of the public schools of said county, the sum of one thousand dollars, as provided in the second section of said act; but it would not be a contract for the period

of ten years, but only for one year from the date of the payment of said sum of one thousand dollars. By said section said associates were not bound to pay said sum of one thousand dollars annually for the term of ten years, but only for so long as they might choose to do business under the provisions of said act.

As the said associates would be bound by such contract only for the period of one year from the date of each successive annual payment of said sum of one thousand dollars, the State could be bound for no longer time. It is of the essence of a contract, that it must be mutual, if both parties are not bound by it, neither is bound.—*Whitworth and Wife v. Hart*, 22 Ala. 343.

At the end of each year, therefore, the contract would end, and the said act would assume again the character of a proposal; and as the said associates had the right to choose whether they would continue or renew the contract, the State necessarily had the right to choose whether she would continue, or withdraw her proposal, and repeal said act. To hold otherwise would be to destroy all mutuality between the parties, and to take away one of the essential elements of a valid contract. The State chose to withdraw her proposal, and at a time when no contract in fact existed, to repeal said act. This she did by the act of the 8th of March, 1871, (book of Acts, p. 217).

The said act of the 31st of December, 1868, being thus repealed, the subsequent payment of one thousand dollars, made by said associates to E. R. Dickson as superintendent of common schools of Mobile county, on the 19th day of April, 1871, was made without any authority of law, and did not authorize them to do business under said act; did not create any contract between them and the State; and, consequently, gave them no authority, no right to exercise the privilege and franchise named in said act; and if, in claiming to do so, they violated the laws of either the State or the city of Mobile against gaming, they were liable to be proceeded against and punished, in the same manner as other persons guilty of the same offense.

If this is a correct construction of said act of the 31st of December, 1868, as I think it is, then their bill, filed to enjoin prosecutions against them for alleged violations of the laws of the city of Mobile against gaming, and to restrain the appellants and others from instituting such prosecutions, is without equity, and the decretal order of the chancellor overruling appellants' motion to dissolve the injunction granted in this case by the circuit court judge, is erroneous, and must be reversed. And this court, proceeding to render such decree as the chancellor should have rendered, it is hereby ordered, adjudged and decreed, that the said decretal order of the chancellor, rendered in vacation, overruling appellants' motion to dissolve the injunction granted in this case, be, and the same is hereby reversed, and the said injunction is dissolved; and it is further ordered, adjudged and decreed, that the appellees pay the costs of this appeal in this court and in said chancery court.

B. F. SAFFOLD, J.—I hold the act to establish the Mobile Charitable Association, &c., if obligatory on the State as a contract at all, to be so for the term of ten years. It requires the association to pay, or cause to be paid, for the use of the public schools of Mobile county, "the sum of one thousand dollars, and annually thereafter a like amount, for the term of ten years, or so long as said partnership shall choose to do business under the provisions of this act." The payment of the one thousand dollars annually is declared to be the consideration upon which the privilege is granted. The fourth section enacts, "that this act shall remain in full force and effect for ten years, upon the consideration herein contained, during which time said partnership company shall have the right to exercise the privilege and franchise herein given, any law to the contrary notwithstanding." My construction of the language quoted is, that the company may terminate the agreement at pleasure, but that the State can not do so before the expiration of the ten years, except in case of forfeiture.

But has the State authority, under the State constitution,

to sell to a collection of persons, whether a partnership or a corporation, an exclusive privilege to carry on a lottery? The people generally are prohibited from doing so without the legislative sanction.—Revised Code, § 3616. No public law gives this sanction.

Article I, section 32, of the State constitution declares that “no title of nobility, or hereditary distinction, privilege, honor, or emolument, shall ever be granted or conferred in this State.” To confer a title of nobility, is to nominate to an order of persons to whom privileges are granted at the expense of the rest of the people. It is not necessarily hereditary, and the objection to it arises more from the privileges supposed to be attached, than to the otherwise empty title or order. These components are forbidden separately in the terms “privilege,” “honor,” and “emolument,” as they are collectively in the term “title of nobility.” The prohibition is not affected by any consideration paid or rendered for the grant. Its purpose is to preserve the equality of the citizens in respect to their public and private rights.

How shall we distinguish these prohibitions from the undoubted right of the State to grant certain franchises to particular individuals in exclusion of others, as a ferry or a corporation, or to contract with its citizens, as for the construction of public works? The theory of our government is the recognition of the utmost liberty of the citizen consistent with the welfare of the society. No restraint imposed by law can find justification elsewhere than in the consideration of the public good. There are necessities and conveniences that can only be supplied to the public by committing the duty or the privilege of doing so to a few. One ferry or toll-bridge is sometimes secured only by forbidding two.

Extreme cases sometimes illustrate a principle when intermediate ones serve only to confuse. The right of way for the construction of a railroad is conceded to be a fit subject for the exercise of the State’s right of eminent domain, though the recipient is a private party. But a prop-

osition to confer upon the same party the exclusive privilege of selling drugs or liquors would be justly regarded as an outrage. The test of the State's authority, therefore, is this: The privilege that can be conferred must conduce to the public good, and be such as is obliged to be committed to a few in order to be available.

In further proof of this test, the power of the legislature to charter corporations, not municipal, heretofore not questioned, has been specially granted by the constitution, and restricted to the passage of general laws from the benefits of which none are excluded who may comply with the conditions prescribed.—Const. art. 13, § 1. This change of the fundamental law was doubtless due to the conviction that the prohibition against exclusive privileges had not been sufficiently observed by the legislature and the courts.

In view of this more stringent guaranty of the equality of the citizens, shall we say that the legislature has power to sell for a term of years to a partnership, the right to set up and carry on a lottery, and to fine and imprison the rest of the people, if they do the same? Suppose I. C. Moses & Co. alone, of all the people, were forbidden to set up a lottery, or to sell dry goods or groceries. The discrimination would not be based on any consideration of the public good, but would tend to the public detriment.

If the test I have proposed be not the correct one, and sufficiently definite, whence come the *mala prohibita*? Blackstone says, "those rights which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has the power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like,) receive any stronger sanction from being also declared to be duties by

the law of the land. The case is the same as to crimes and misdemeanors that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature, for that legislature in all these cases acts only, as was before observed, in subordination to the great Law-giver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all with regard to actions that are naturally and intrinsically right or wrong.

But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, "*according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life.*"—Vol. 1, p. 54. Experience has since shown a necessity for controlling somewhat the discretion of the legislature in the interest of freedom of personal action; and hence come the rights "reserved to the people." To prohibit the pursuit of necessary business, or to commit it to a few, to the exclusion of the rest of the people, would be a flagrant usurpation on the part of the legislature. Setting up a lottery is conceded to be the subject of the *mala prohibita*. Therefore, either the act in question confers an unconstitutional privilege, or the law prohibiting the people generally from setting up lotteries withholds a constitutional or reserved right. There is no doubt about which must fall.

This act is unique in its structure, if not commendable. It purports "to establish the Mobile Charitable Association for the benefit of the common school fund of Mobile county, without distinction of color." The only benefit derived by the schools is the money paid as the *consideration of the franchise*. A charitable association is supposed to have for its object the relief of suffering humanity. The purpose of I. C. Moses & Co.'s franchise is to put money in their purses, without rendering an equivalent for it, and

Horst, Mayor, &c., et al. v. Moses et al.

without regard to the reckless gambling propensity it may excite in the community. The application of the words, "without distinction of color," is left to conjecture. Article IV, section 2, of the State constitution says, "Each law shall contain but one subject, which shall be clearly expressed in its title." There is nothing in this act correspondent with the laudable subject so clearly expressed in its title.

I think the injunction ought to be dissolved, on account of the invalidity of the act in question, and because, if valid, it requires the distribution of the prizes to be *fairly made*, which is not the case in the games called keno and roulette.

PECK, C. J., concurs in this opinion as to the unconstitutionality of the act.

PETERS, J.—I can not concur in the reasons assigned by the majority of the court for the judgment pronounced in this cause. A brief statement of the facts and the law, as they impress my mind, will show the grounds of my dissent.

On the 31st day of December, 1868, there was approved by the governor of this State, an act of the general assembly, entitled "An act to establish the Mobile Charitable Association, for the benefit of the common school fund of Mobile county, without distinction of color." The first section of this law, omitting the enacting clause, is in the following words: "That I. Clifton Moses and Fred. H. Fowler, of Mobile, Alabama, and Eugene Beebe, of Montgomery, Alabama, and their associates, as partners, shall have the full right and authority to form themselves into a partnership association, to be known under the firm name and style of "I. C. Moses & Co.," or such other name as they may designate, for the *purpose* of receiving subscriptions, and to sell and dispose of certificates of subscription, which shall entitle the holder thereof to such prizes as may be awarded to them, which distribution of award

shall be fairly made in public, by casting of lots, or by lot, chance or otherwise, in such manner as to them may seem best, to promote the interest of the school fund of Mobile county, which said distribution of award and prizes shall be made at their office, in the city of Mobile, or such other place or places in the State as they may direct."—Pamph. Acts 1868, p. 511, sec. 1. For the "full right and authority" thus given, the company above-said agreed to pay to the Board of School Commissioners of Mobile county, for the use of the public schools of said county, the sum of one thousand dollars, and annually thereafter a like sum, for the term of ten years, or so long as said partnership shall choose to do business under the provisions of said act. This statute confers the "privilege and franchise" upon the "partnership company," thereby created for ten years, "upon the consideration therein contained," any law to the contrary notwithstanding.—Acts 1868, pp. 511, 512, *supra*, No. 167. The first one thousand dollars was properly paid. This was an acceptance of the terms proposed in the act, and vested the company with the rights and franchise therein conferred.—*Manaway v. The State*, 44 Ala. 375. The law in question establishes a "franchise" of a peculiar character. A franchise, during the period of its continuance, is said to be an incorporeal hereditament. At common law, it is a royal privilege or branch of the King's prerogative, subsisting in the hands of the subject. And it arose from the King's grant.—2 Bla. Com. p. 37, 38, marg. With us, they are conferred by grant from the government, and are vested in individuals.—*Bank of Augusta v. Earle*, 13 Pet. 519, 595, Taney, C. J. They contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant. The government can not resume them at pleasure, or do any act to impair the grant, without a breach of contract.—3 Kent, 458, 459. In this definition I use the language of Chancellor Kent; a text writer of but little less authority than a judicial opinion. It seems

to me that it hardly needs an argument to show that such a grant of franchise or privilege can not be impaired by a repealing act. It is also patent to my mind that the general assembly has power to make such a grant, and that this power is not intended to be interfered with, by the *thirty-second* section of the first article of the State constitution. The mere recital of this section of our fundamental law, without more, would seem to refute this idea. I quote its words, so far as they apply to this case. They are these: "No title of nobility, or *hereditary* distinction, privilege, honor, or emolument, shall ever be granted or conferred in this State."—Const. Ala., Art. I, § 32. These words scarcely need interpretation to find out their true sense; that is, the sense in which they were used by the people in their highest State law. Obviously, the people intended, by these words, to impose some limitation on the legislative will of the general assembly. But they did not intend to go beyond what had formerly been customary. They did not intend to cut off the power to grant, for limited periods, merited distinctions and honors to the citizens who had rendered great and important services to the State, or to grant privileges or emoluments to be used for the public good. In other words, they did not intend to prohibit all right to grant any privilege, franchise or emolument whatever. Had this been their purpose, the language used would have been without any qualifying and limiting adjective. The word "*hereditary*" would have been left out of the sentence altogether. This word qualifies the whole series of particulars enumerated in the sentence, as if it had been repeated before each. The State constitution of 1819 contains a section of similar import with that above quoted, and almost in the identical words. Yet many franchises and exclusive privileges were granted under it, without objection—such as the right to establish toll-bridges, toll-causeways, ferries, and the supplying cities with pure water and gas-lights.—Const. Ala. 1819, Art. I, § 26, Clay's Dig. p. 27; Code of Ala. p. 31; Revised Code, §§ 1383, 1389; *Mobile Water Works, Montgomery Gas*

Horst, Mayor, &c., et al. v. Moses et al.

Works; and see the discussions in *Dale v. Governor*, 3 Stew. 387; *Stein v. Mayor of Mobile*, 17 Ala. 234, S. C. 24 Ala. 591; *People v. Utica Ins. Co.*, 15 Johns. 358; *Pres't, &c., of Newburg and Cohecton Turnpike Road v. Miller*, 5 Johns. Ch. R. 101; *Micou v. Tallassee Br. Co.*, January term, 1871. The power to grant and confer privileges, honors or emoluments, intended to be prohibited, were such as were "hereditary," and not such as were limited to a reasonable length of time. Here the limitation was only for ten years at most, or "so long as the said partnership shall choose to do business under the provisions of" said act. "And whenever said company shall fail to pay said sum according to the provisions of said act, then, and in that case, their *right to do business* shall cease." Acts 1868, p. 511, 512, § 2, *supra*. Then, if this right is a franchise, a privilege purchased from the State upon a consideration, it is a *contract*, and can not be repealed. In Colonel Sam. Dale's case, involving a like question, Lipscomb, C. J., declares: "The only question, it seems to me, that can be raised in this case, is, whether a contract has been made between the State of Alabama and the plaintiff, (Dale,) by which he has acquired a vested right to the amount of money directed to be paid to him by the act of 1821. If such a contract was enacted by that act, I have too much respect for the court of which I am a member, to waste time in urging any argument in favor of the position, that it is not only our right, but our duty, and one that can not be evaded, to declare any subsequent act of the legislature, abrogating the contract, wholly void. This doctrine is now too well settled to admit of a controversy."—*Dale v. The Governor*, 3 Stew. 387, 403. Add this to what has already been said against the validity of the repealing act of March 8, 1871, and the argument would seem to be complete.—Pamph. Acts 1870, 1871, p. 217, Act No. 180. The repeal was of no validity, and did not, in any wise, effect the appellee's rights, whatever these may be. In this, I differ and dissent, with respectful regret, from the conclusions of the majority of the court.

Nor is this a corporation such as the legislature can "alter, amend, or repeal." This power is given only where there is a general law of incorporations, or special act passed pursuant to the article of the constitution on "corporations."—Const. Ala. Article XIII, § 1; see Pamph. Acts 1870, 1871, p. 26, "corporations." This is not such a law as those there referred to.

Another objection to the law first above quoted, under which the appellees seek to justify their proceedings, is, that its title is defective. If there were such a class of objections known to judicial tribunals as *petulant* objections, I would be inclined to put this objection in that class. Certainly, a good law ought not to be driven out of court, because its authors were not critically skillful in the invention of names; that is, that they were not persons who could split and divide a hair, "twixt north and north-west side." It is true, the constitution commands that "each law *shall* contain but *one subject*, which shall be *clearly expressed* in its title."—Const. Ala., Art. IV, § 2; see Pamph. Acts 1870, 1871, p. 8. By reference to the law under discussion, it will be seen that its title contains but one subject; that is to say, the "establishment of the Mobile Charitable Association, for the benefit of the common school fund of Mobile county, without distinction of color." And this is very clearly expressed. It is not to be expected that the details of "the business" of the Association is to be set out in the title of the law, else this would make the title the law itself. In discussing this novel feature in legislation, a distinguished and experienced judicial officer uses the following language: "It would be most mischievous, in practice, to make the validity of every law depend upon the judgment of every judicial tribunal of the State, as to whether an act or bill contained more than one subject, or whether this one subject was clearly expressed in the title of the act or bill. Such a question would be decided according to the mental precision and mental discipline of each justice of the peace and judge. No practical benefit could arise from such inquiries."

Horst, Mayor, &c., et al. v. Moses et al.

Pim v. Nicholson, 6 Ohio, (N. S.) 179. When the title fairly indicates the main purpose of the law, this is enough. Cooley's Const. Limit., p. 141, *et seq.*, and cases there cited. In this view of the constitutional restriction above quoted, I can not concur with a majority of the court, but respectfully dissent.—44 Ala. 639, 646.

There is one other question that remains now for further consideration. That is this: Does the statute of the 31st of December, 1868, authorize "I. Clifton Moses & Co." to do the "business" for which they claim protection in their bill? If it does, then I think they have shown sufficient grounds to invoke the aid of the court to protect them in the further continuance of the same, until they make default in the payment of the annual sums required by the act. If it does not, then they are entitled to no relief, and their injunction should be dissolved and their bill dismissed with costs. Then, what is the "business" the "association" is entitled to pursue under the act? The act declares that the "association" was allowed to be formed "for the purpose of receiving subscriptions, and to sell and dispose of certificates of subscription, which shall entitle the holder thereof to such prizes as may be awarded to them."—Acts, *supra*, § 1, p. 511. This is the means provided by the law to carry on "business" under the franchise. This may be done, whatever it may mean, without the violation of the statutes against gambling; that is, without keeping a gaming table in the manner forbidden by the Revised Code.—Rev. Code, § 3621. The scheme of operations set out in the bill is clearly that of keeping or exhibiting "a table for gaming." The legislature did not intend to repeal this section of the Code, by the law allowing the formation of this association, and turn loose upon society the evils thus restrained.

I therefore concur in the judgment of the majority of the court.

EX PARTE ABRAMS.

[APPLICATION FOR MANDAMUS.]

1. *Continuance, order of; construed in case at bar.*—An order of court continuing a cause which is expressed in the following words: "Came the parties by their attorneys, and on motion of the plaintiff for a continuance of this cause, it is ordered by the court that this cause be continued by the plaintiff, on payment of the costs in this behalf expended in ninety days," is only a continuance on terms; but it does not dismiss the cause, if the terms thus imposed are not complied with.
2. *Same; when court can not strike cause from docket on failure to comply with order.*—If the plaintiff, at the next term of the court after the continuance, is ready and willing to pay the costs, and tenders the same to the court before the cause is called for trial, the court can not *strike* the cause from the docket, because the costs were not paid in ninety days, as limited in the order of continuance.
3. *Mandamus; when proper to compel restoration of cause to docket.*—And if the cause is thus stricken from the docket, this court will order its restoration upon *mandamus* to the court below.

This was an application for a *mandamus* to be directed to the presiding judge of the circuit court of Butler, commanding him to reinstate upon and restore to the docket a case which the court had stricken from the docket, upon the failure of the petitioner to pay costs within the time mentioned in an order continuing the cause.

THOS. G. JONES, for petitioner.

THOS. J. JUDGE, *contra*.

PETERS, J.—This is an application for a *mandamus*, by Hannah Abrams, against the judge of the eleventh judicial circuit, sitting in and for the county of Butler.

The facts set forth in the petition and the bill of exception, which is made a part of the petition, are briefly these: The petitioner, Mrs. Abrams, sued Joseph R. Abrams, as surviving partner of the firm of J. R. & H. S. Abrams, in an action of debt, to recover five thousand dollars, money

Ex parte Abrams.

loaned by the plaintiff to said H. S. Abrams for the use of said partnership. The action was brought to the spring term, 1869, of the circuit court of said county of Butler. And the suit, thus brought, came on to be heard at the fall term, 1871, of said circuit court. The plaintiff, Mrs. Abrams, was not then ready for trial; and on her motion the cause was continued. The following is a copy of the order of continuance thus granted—that is to say:

“Came the parties by their attorneys, and on motion of the plaintiff for a continuance of this cause, it is ordered by the court, that this cause be continued by the plaintiff on payment of the costs in this behalf expended in ninety days.”

The plaintiff failed to pay the costs as required by this order in the time therein prescribed. But she brought the money to pay the costs into court at the next term to which the cause had been continued, before the cause was called for trial; and on the call of the cause for trial she was ready in court with the money to pay the costs, and tendered the same for that purpose and declared herself ready and willing to pay the same. The court refused to permit the money to pay the costs thus tendered to be paid into court for that purpose; and, on motion of the defendant, “struck the cause from the docket and adjudged the cause to be at an end.” To this the plaintiff objected, and reserved the objection by proper bill of exceptions.

The order above quoted is clearly a continuance of the cause until the next term of the court in due course, with directions that plaintiff shall pay the costs in ninety days after the order for the continuance was allowed. But there was no order that if the costs were not paid in the time limited, then the cause should be dismissed. At the next term of the court after the continuance, the cause was still pending. It had not been dismissed, nor had the plaintiff been advised that it would be dismissed on a failure to pay the costs in ninety days. The words, “on payment of the costs in this behalf expended,” do not necessarily imply a condition. They only signify the *terms* on which the con-

tinuance was granted, and not a condition which defeats the continuance if not complied with; or which turns the plaintiff out of court. The order makes the plaintiff liable for the costs up to the continuance, and exonerates the defendant, so far as this can be done, from their payment, whatever might be the result of the suit. The cause, then, was not out of court at the commencement of the term next succeeding the grant of the order of continuance, nor had the plaintiff, by the terms of the order, forfeited her right to remain in court up to that time. But the learned judge in the court below seems to have thought otherwise. He mistook the purport of the order, in construing it as a dismissal of the suit upon a failure to pay the costs in ninety days. Such a construction is inadmissible. The striking the cause from the docket was such an invasion of the plaintiff's right to remain in court, as is unauthorized by law. The cause should have been retained upon the docket, and the plaintiff should have been permitted to pay the costs, as she proposed to do.

The principles settled in the case of *Ex parte Lowe*, (20 Ala. 330,) seem fully to justify the allowance of the remedy by *mandamus* in this case.

And the issuance of a rule *nisi* having been waived by agreement of counsel filed in this cause, a peremptory *mandamus* will be issued in conformity with the prayer of the applicant's petition. Costs will be reserved until the coming in of the return to the *mandamus*.

POWELL *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. On the trial of a capital felony, W. was summoned as a juror. Being sworn and examined by the court, he was pronounced competent, and was then accepted by the State and by the accused as one of the jurors for the trial. W. then informed the court that he was a member of a fire company and was therefore not liable to serve on the jury, and asked to be discharged. The court replied, that he could not be discharged. W. then told the court that he would discharge himself, and left the court room; and thereupon, without discharging W., the court caused another juror to be selected in his place, without the consent of the accused,—*Held*, that this was an error for which the judgment must be reversed.

APPEAL from the Circuit Court of Macon.

Tried before Hon. LITTLEBERRY STRANGE.

The opinion states the case.

GRAHAM & ABERCROMBIE, for appellant.—The juror West was pronounced competent by the court and accepted by the State and defendant. Whatever rights he may have had to claim exemption from jury duty, he waived them by not making his excuse before he was accepted. The decision of the court would therefore have been right, even if the juror West had been exempt from jury duty under the charter of the fire company. That charter is not set out, and this court must presume, therefore, that the ruling of the court was right in every aspect of the case.

The court had no right to excuse West under the circumstances of the case. There was no *necessity* or law to authorize such action. It matters not, therefore, that the court acquiesced (by not attaching the juror for contempt) in the juror's determination to "excuse himself;" the court had no power to sanction or confirm, directly or indirectly, the action of the juror.—*Lyman v. The State*, 45 Ala. 72; *Boggs v. The State*, 45 Ala. 30.

The rights of the defendant having been violated by the improper discharge of the juror, the case must be reversed.

JOHN W. A. SANFORD, Attorney-General, *contra*.

PETERS, J.—At the spring term, 1872, of the circuit court of Macon county, the appellant, John Powell, was indicted for the murder of Irwin Foster, arraigned and put upon his trial, on the plea of not guilty. The bill of exception shows, that his “case being regularly called and both parties having announced “ready,” and proceeding to select a jury to try said cause under the provisions of the statute in such case provided, one *P. S. West*, who was regularly summoned as a juror to try said cause, was called and being examined by the court as to his qualifications and competency as such juror, was pronounced by the court a competent juror and so put upon the parties, and as such was accepted by the State and also by the defendant; the said juror then remarked to the court that he was a member of a fire company, and therefore excused from serving as a juror; and in reply to said remark, the court said that the court could not excuse him: thereupon, the said juror said that he would excuse himself, and retired from the court room, against the objection of the defendant and without any further action or order of the court, and the defendant excepted.” The court then went on with the selection of the jury until the proper number was completed; but after twelve were selected, including said *P. S. West*, the defendant objected that any other juror should be selected in his place. The court overruled the objection, and completed the jury without him. The defendant again excepted. And his exceptions were properly made a part of the record in the case. The jury having been so selected the parties proceeded to trial, and the defendant was found guilty of manslaughter in the first degree, and by proper judgment of the court he was sentenced to hard labor for the county for the term of seven years, and to pay the costs of the prosecution. From this judgment he

appeals to this court, and here insists that the court below erred in the manner of selecting the jury to try him.

This case presents some unusual incidents in a criminal trial of so serious a character as this, and which are not without embarrassment. The juror *West* was clearly guilty of a contempt, in quitting the court without permission of the presiding judge. A judicial contempt is any willful disregard of the authority of the court, rightfully exercised. The power to punish for contempt is inherent in the court. In this State, the exercise of this power is limited to certain specified "cases." There are *seven* cases enumerated. The first of these is defined in the following words, viz: "Disrespectful, contemptuous, or insolent behavior in court, tending in any wise to diminish or impair the respect due to judicial tribunals, or to interrupt the due course of the trial."—Revised Code, § 637, cl. 1; see, also, *Withers v. The State, ex rel.*, 36 Ala. 252; *Ex parte Walker*, 25 Ala. 87; 2 Bac. Abr. (Bouv.) p. 616; *Courts*, 2 Bac. Abr. (Bouv.) 233, 234, E; *United States v. Hudson*, 7 Cra. 32; *Yates v. Landing*, 6 John. 337. The court, then, had the authority to attach the insurgent juror and to inflict punishment for his contempt, if found guilty on a hearing, by a fine not exceeding fifty dollars, and imprisonment not exceeding five days.—Revised Code, §§ 637, 746, cl. 4. This power should have been exerted. It was due alike to the court and to the defendant. After a juror, summoned in a capital felony, is drawn and accepted by the State and put upon the acceptance of the accused, and taken as one of his triers by him, the court can not discharge him or permit him to be omitted from the jury, without the defendant's consent, except for the reasons specified in the statute law. I know no rule of law or necessity in such a case as this that forfeits this right of the accused. And he can not be deprived of the benefit of this right without his consent. *Brazier v. The State*, 44 Ala. 387; *Lyman v. The State*, 15 Ala. 72; *Boggs v. The State*, 45 Ala. 30. A juror who is entitled to be excused should not be kept on the jury, but he should insist upon his exemption before he is se-

lected and accepted by the accused as one of his triers. We are unwilling to believe that the learned judge of the court below would refuse or deny a proper exemption when properly made. A judge may err, but it is not to be presumed that he would willfully violate the law and deny a right secured to a citizen by law.—Revised Code, § 4078. The court may discharge a juror after his selection, if he becomes sick, or if for other cause it becomes *necessary*, in the opinion of the court, to discharge him.—Revised Code, §§ 4201, 4202, 4203. But it does not appear that the juror in this case was discharged by the court. After being selected and accepted by both parties, he was permitted to leave the court and another juror was selected in his place, without the consent of the accused. This was error.

The judgment of the court below is reversed, and the cause is remanded for a new trial. The accused, said John Powell, will be held in custody until discharged by due course of law.

TAYLOR vs. THE STATE.

[INDICTMENT FOR PERJURY.]

1. *Charge to jury; when inapplicable to evidence or assuming truth of, may be refused.*—A charge that is inapplicable to the issue, and calculated to mislead the jury, should be refused. So, too, a charge that assumes the truth of the evidence, and withdraws from the jury the consideration of its credibility, ought to be refused.
2. *Objection improperly overruled to question asked witness; when not injury.*—Where an objection to a question proposed to a witness is improperly overruled, if the question be not answered, it is an error without injury.
3. *Perjury; not necessary to prove oral testimony ipsissimis verbis, on which perjury is assigned.*—On a trial for perjury, in proving what the prisoner orally testified, it is not necessary that it be proved, *ipsissimis verbis*; it is sufficient to prove substantially what he said.

Taylor v. The State.

APPEAL from the City Court of Mobile.

Tried before Hon. C. F. MOULTON.

The opinion states the case.

W. W. D. TURNER, for appellant.—The court erred in refusing the instruction asked for by the accused on the trial of the plea of misnomer.

It is a man's *right* to be tried by his real or right name. The charge should have been given, because proof was conclusive that his name was Granville Taylor, and he was never known as Henry Taylor, except upon the one occasion upon which it is alleged the offense of perjury was committed.

If he committed perjury under the name of Henry Taylor, which was false and fictitious, he could still have been convicted by his right name of Granville Taylor.

The charge asked for could not have operated to the prejudice of the State, but would have enabled the accused to have been tried by his right name.

The court erred in allowing the witness Faith to testify to the substance of what the accused swore to before the justice at the time it was alleged the perjury was committed.

Unless the witness could remember the precise language of the accused, he would have but little chance to defend himself.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The first charge asked was calculated to mislead the jury on a false issue. It also assumed the truth of the testimony of defendant's witnesses, and took away from the jury the right to determine for themselves the credibility of the witnesses.

2. The question objected to was not answered. No injury could have been done the defendant by the ruling of the court on this point, if it be admitted that the ruling was erroneous.

3. The substance of the false testimony was all that was necessary to be proved.—3 Greenl. Ev. § 194.

PECK, C. J.—The indictment charges the appellant with the crime of perjury, on his examination in a proceeding for vagrancy, before a justice of the peace, against one Carrie M. Ward. The indictment is against him by the name of Henry Taylor, and he pleaded in abatement that his name was Granville Taylor, and not Henry Taylor, as charged in the indictment, nor had he ever been known by that name. The State took issue on said plea, and on the trial of said issue the State proved by a number of witnesses that they were present and heard the accused answer to the name of Henry Taylor; that he swore out the warrant of arrest in the name of Henry Taylor, signing his name as Henry Taylor; and on the trial of the case, in which said warrant was issued, he said his name was Henry Taylor, and answered to his name as Henry Taylor on the trial of the case before the justice, in which it was alleged the perjury was committed.

The accused then put a number of witnesses on the stand, who testified that they had known the accused a number of years, and had never known him to be called, or known, by any other name than that of Granville Taylor, and that his name was Granville Taylor. Among these witnesses was one Benjamin Abrams, who testified that he had known the accused, intimately, ever since he was a little boy, and that he knew his name was Granville Taylor, and had never heard him called by any other name.

When the evidence on said issue was closed, the accused asked the court, in writing, to charge the jury as follows, to-wit: "The defendant asks the court to charge the jury, "that any one wrongful act, on the part of the accused, by "an assumed or fictitious name, will not authorize the jury "to infer that that is his right name, in opposition to the "positive testimony of witnesses, who swear positively to "his right name."

This charge the court refused to give, and the accused excepted.

The court committed no error in refusing to give this charge. It was inapplicable to the issue, and well calcu-

lated to mislead the jury. The issue was not that the name of the accused was Henry Taylor, but that his name was Granville Taylor, *and that he had never been known by the name of Henry Taylor*. Now, if all that the charge asked had been admitted, it would not have authorized the jury to find the issue in favor of the accused, but, if the charge had been given, the jury might have been misled, and believed that it did. Another objection to this charge is, that it assumed the truth of the evidence on the part of the accused, and, in effect, withdrew from the jury the consideration of its credibility.

The verdict of the jury was against the said plea in abatement, and, thereupon, the accused pleaded not guilty. On the trial, the State introduced a witness, and asked him what was the nature of the proceedings, before Justice Burns, at the time it was alleged the accused committed the crime of perjury? To this question the accused objected, and insisted upon the production of the record, as the best evidence. The court overruled the objection, and he excepted. The question does not appear to have been answered. Therefore, if it be conceded the question was improper, the accused was not thereby prejudiced, and if the court erred, it was an error without injury. The witness then proceeded to testify to the substance of what the accused said, at the time it was alleged he committed the crime of perjury, and stated that he could not pretend to repeat the identical language of the accused, &c. The accused objected to the witness testifying to the substance of what he said, upon the occasion referred to. His objection was overruled, and he excepted. There was no error in overruling this objection.

Mr. Greenleaf says: "In proving what the prisoner orally testified, it is not necessary that it be proved *ipsis-simis verbis*; nor that the witness took any note of his testimony; it being deemed sufficient to prove *substantially* what he said, on the point in hand."—3 Greenleaf Ev., § 194.

The accused was convicted and sentenced to be imprisoned two years in the penitentiary.

The foregoing are the only questions made in the bill of exceptions, and we find no errors in the other parts of the record.

Let the judgment of the court below be affirmed at appellant's costs.

WARD vs. THE STATE:

[INDICTMENT FOR LARCENY OF A DOG.]

Dog; not the subject of larceny.—There is no such property in dogs as makes them the subject of larceny in this State.

APPEAL from the City Court of Mobile.

Tried before Hon. C. F. MOULTON.

The indictment in this case, charged that the defendant "feloniously took and carried away a dog, the personal property of Patrick O'Brien, of the value of twenty-five dollars," against the peace, &c. He went to trial on plea of not guilty, and was convicted. The taking by the defendant was proved, but the evidence was conflicting as to whether it was a felonious taking. The owner of the property testified that the dog was worth \$25.

The defendant, among other charges, requested the following: "A dog is not the subject of larceny in this State, and the jury must, therefore, find defendant not guilty under this indictment." This charge the court refused, and the defendant excepted. There were other exceptions reserved to the rulings of the court below, which need not be further noticed.

R. & O. J. SEMMES, for appellant.—By the common law, dogs are not the subject of larceny—and the common law as to this has not been changed by statute in this State.

At the common law, dogs were not "personal property." However, injuries to a dog may be viewed in a civil action brought by the owner, to recover damages for the injury; the rule is different in a criminal prosecution for stealing the dog. At the common law choses in action were not the subject of larceny, although they be of value to the owner, and an action on the case would lie for their destruction. It took a statute to cure the defect in the law.

JOHN W. A. SANFORD, Attorney-General, *contra*.—The rule of the common law that dogs can not be the subject of larceny, should not be enforced. It has long been held that civil actions could be maintained to recover them as property, or to recover damages for injury done to them which depreciated their value. And being recognized as property, no reason can be assigned why the thief should not be punished as well for the larceny of a dog as for any other property of equal value.—*Parker v. Wise*, 27 Ala. 480.

PECK, C. J.—The appellant was indicted in the city court of Mobile for stealing a dog, convicted and sentenced to be imprisoned for the period of thirty days in the common jail of said county. On the trial, the appellant requested the court to charge the jury that a dog was not the subject of larceny in this State, and that he could not be convicted under said indictment. This charge the court refused to give, and he excepted. Other questions are made in the bill of exceptions, but it is unnecessary to consider them, as we hold the charge asked and refused, as above stated, should have been given.

The writers on the common law uniformly say that dogs are not the subjects of larceny. We refer to Blackstone only, as one of the safest and best of these writers. He says: "As to those animals which do not serve for food, "and which, therefore, the law holds to have no *intrinsic* "value, as dogs of all sorts, and other creatures, kept for "whim and pleasure, though a man may have a *base* prop- "erty therein, and maintain a civil action for the loss of

"them, yet they are not of such estimation as that the 'crime of stealing them amounts to larceny.'"—4 Wendell's Bl. 236. In the case of the *People v. Maloney*, 1 Parker's Cr. Rep. 593, it is held, that at the common law a dog was not the subject of larceny, but as the statutes of that State, New York, recognized dogs as property, by subjecting them to taxation, and defined larceny, so as to cover the taking and carrying away all kinds of property, except the freehold, and things which were parcel of it, the stealing of a dog was larceny.

In North Carolina it has been held, that malicious mischief may be committed by killing a dog.—*The State v. Latham*, 13 Iredell's Law Rep. 33. But whether this is by the common law, or by a statute of that State on the subject, we are not advised.

This question is a new one with us, and, so far as we know, has never been decided in this court. In the case of *Parker v. Wise*, 27 Ala. 480, it is decided that a dog is a species of property, for an injury to which an action at law may be sustained. That in an action for shooting a dog, it is not necessary to show that the dog had any pecuniary value; that wherever there is a wrongful taking of the property, or a wrongful injury done to it, the law implies that the owner has sustained some damage; and although there be in fact no sensible damage from the loss, or injury of the property, or from an actual deprivation of its use, the owner is entitled to recover some damage.

This case leaves the question, as to the character of the property held in these animals, as it stands by the common law, and, as we have no legislation, changing the common law on this subject, it is the law by which the liability of the appellant, under this indictment, must be determined; and by that law we have seen that dogs are not the subjects of larceny.

The indictment was found under § 3708, R. C., which says, that any person who steals any personal property, under any other circumstances than are specified in the two preceding sections, is guilty of petit larceny. We

think it safest to refer to the common law, for the meaning of the words "personal property," as used in that section, and that law declares that dogs are not *such* personal property as is the subject of larceny. Is it not reasonable to presume the legislature used these words in the sense in which they are understood in the common law, in reference to the same subject? Besides, we think it persuasive to show that these animals, in this State, are not regarded as property, in the proper sense of that term, as they are neither administered as such, nor taxed as other property. It is the duty of an administrator to make an inventory of the personal property of the deceased, and this duty is discharged under the obligation of an oath. Yet, we know that dogs are not inventoried as a part of the estate of deceased persons. So, too, by the constitution, all property is required to be taxed, in exact proportion to its value.—Art. IX, § 1. Yet we also know, that dogs are not taxed, although every person is required to render to the assessor, under oath, a list of his taxable property; but dogs, as we believe, are never found in such lists.

For these reasons, and because this species of property is not the subject of larceny by the common law, we are not disposed, by a sort of judicial legislation, to make any change in the law on this subject. If the public good requires a change to be made, as we think it does not, it is the appropriate duty of the legislature, and not of the courts, to make it.

The common law gives the owners of this kind of property a civil action to recover damages for its destruction or injury. This, until the law is changed, is all the protection that can be claimed for it.

The judgment of the court below is reversed, and the cause is remanded, with instruction that the appellant be discharged.

THOMPSON *vs.* THE STATE.

[INDICTMENT FOR LARCENY.]

Larceny, name of owner of property; what is immaterial variance as to name of owner.—Where an indictment for larceny charges the stolen goods to be the property of J. H. Dargin, and the evidence shows that his name is John H. Dargin, but that he was frequently called J. H. Dargin, and wrote his name J. H. Dargin, this is not such a variance as entitles the defendant to an acquittal.

APPEAL from the Circuit Court of Madison.

Tried before Hon. W. J. HARRALSON.

The facts are set forth in the opinion.

DAVID D. SHELBY, for appellant.—1. The indictment alleges that J. H. Dargin is the owner of the goods; the proof is that the owner's name is John H. Dargin. A mistaken christian name was anciently more fatal than a mistaken surname.—Bacon's Abgt., Title, Misnomer, 2 Hawkins's P. C. 317; 2 Hale's P. C. 175-6; but "modern decisions make no distinction."—*Lynes v. State*, 5 Por. 236.

2. Any substantial variance between the name of the owner as given in the indictment, and as proved on the trial, will be fatal.—1 Whar. Cr. L. 595, 598; 2 *Ibid*, 1821; 1 Bish. Cr. L. 681; 1 Bish. Crim. Procedure, 119; 1 Chitty Cr. L. 216; *Rex v. White*, 1 Leach, 225; *U. S. v. Howard*, 3 Sumner, 12; *U. S. v. Keen*, 1 McLean, 429; *Commonwealth v. Wade*, 2 Va. Cas. 325; *Kirk v. Suttle*, 6 Ala. 679; *Eskridge v. The State*, 25 Ala. 30; *The State v. Flora*, 4 Por. 114; 20 Ala. 39; 3 Greenl. Ev. 22.

3. Upon a variance in the name of material third parties it is the duty of the court to order an acquittal.—1 Whar. Crim. Law, 259 (4th.)

4. The indictment should state both the christian and

surname of the owner of the goods.—2 Bish. Crim. Pro. 680; or it should state that the part of the name omitted is to the grand jury unknown.

5. Every person is presumed to have a christian name. In *Zellers v. The State*, 7 Indiana Reports, 659, the indictment alleged the passing to A. B. Robinson a forged bank note. It was proved on the trial that Robinson's name was Alexander B. Robinson, but that he was often called A. B. Robinson. The court held that the variance between the name alleged in the indictment and the name proved on the trial was fatal.

6. In *Willis v. The People*, 1 Scam. 399, the indictment alleged the goods to be the property of T. D. Howke and E. Dobbins, doing business in the town of Equality, under the firm name of T. D. Hawke & Co., and the court said: "This is clearly erroneous; there is no reason whatever to justify the omission to state the christian names of the owners."

7. An error in stating the name of third persons is more fatal to the indictment than a mistake in the name of the defendant, (1 Whar. 595,) and is not a mere formal defect.

JNO. W. A. SANFORD, Attorney-General, *contra.*, contended that whatever the law may be elsewhere, the practice of describing parties by the initials of the christian names, had been too long acquiesced in and followed in the courts of Alabama, to be now departed from. The proof shows that the witness, although named John H. Dargin, was frequently called J. H. Dargin, and also, that he was the owner of the property; in fact, that J. H. Dargin and John H. Dargin were one and the same person. There is nothing going to show that there was more than one person of that name in the county, or that the accused was in any way embarrassed or hampered in making his defense by reason of the initials only of the christian name being given in the indictment.

PECK, C. J.—The defendant was indicted for stealing certain personal goods, charged to be the property of J.

H. Dargin, who was marked on the indictment as the prosecutor.

On the trial, said Dargin was examined by the State, and deposed that he was the owner of the property described in the indictment; that his name was John H. Dargin; that he was frequently called J. H. Dargin, and signed his name J. H. Dargin.

This, the bill of exceptions states, was all the evidence on this point.

The court charged the jury, that if they believed that the prosecutor, J. H. Dargin and John H. Dargin, was the same person, that the variance between the name as proved, and the name as given in the indictment, was not material, to which charge the defendant excepted.

The defendant, in writing, asked the court to charge the jury that the variance between the name of the owner of the property, as alleged in the indictment, and as proved on the trial, was fatal to the indictment, and they must acquit the defendant. This charge the court refused to give, and the defendant excepted.

Defendant appeals, and insists that the court erred, both in the charge given, and in refusing to give the charge asked.

We think no error was committed, either in the charge given, or in refusing to give the charge asked. Although I do not approve of the practice, which prevails so generally in this State, of describing parties in judicial proceedings by the initials of their christian names, and do not wish to be understood as encouraging it, it is too late to undertake to correct it now, as, to do so, would do more harm than good. I do not know that this question has ever been directly made in this court, but I find it has been decided in South Carolina, in the case of the *State v. Silas Anderson*, 3 Richardson, 172. It is there decided that in describing third persons in an indictment, certainty, to a common extent, is all that is required; and if such persons are described by the initials of their christian names, the indictment, on its face, is sufficiently certain.

Thompson v. The State.

In that case the defendant was indicted for acts of re-tailing to A. B. Arnold, F. P. Robinson, Henry Power, and certain other persons.

A motion to quash the indictment for uncertainty was overruled. When the evidence was heard, it appeared that, although these letters were only initials of the true christian names, yet, that by these letters, the persons designated were called and known : that they wrote these letters for names, answered to them, and were distinguished by them. This was held sufficient ; and the court said : “ Under these circumstances, and in the general “ use of initials, for names, which prevails, it would be “ straining for the relief of the accused, to say that he “ must be presumed incapable of knowing the persons “ mentioned, by the description which pointed them out “ without doubt to every body else.”

In this case J. H. Dargin is marked on the indictment as the prosecutor, and although his true name is John H. Dargin, yet, as he was frequently called J. H. Dargin, and wrote his name J. H. Dargin, and proved that he was the owner of the stolen goods, we think the variance, if it can properly be called a variance, is no ground for the acquittal of the defendant. If the indictment had charged the stolen goods to be the property of D. H. Dargin, and on the trial they had been proved to be the property of John H. Dargin, then the variance would have been substantial, and the defendant would have been entitled to an acquittal.

Let the judgment be affirmed at the defendant's costs.

LINDSEY ET AL. *vs.* THE STATE.

[INDICTMENT FOR CARD PLAYING, &c.]

Variance between indictment and proof.—An indictment charging three persons jointly with playing at a game of cards, at a public place, &c., in the form given in the Revised Code, (p. 810, form 27,) is not supported by evidence that two of the defendants played together at the game, at a public place, and that the other defendant played at a game of cards at the same time and place, with persons not indicted—the two games being separate and distinct, and at different tables, and having no connection with each other. Only those persons who participated in the same game should be joined in one indictment.

APPEAL from the Circuit Court of Coffee.

Tried before Hon. J. McCaleb Wiley.

The opinion states the case.

ROBERTS, and SEALS & WOOD, for appellants.

JNO. W. A. SANFORD, Attorney-General, *contra*.

PETERS, J —Arch Lindsey and several others were prosecuted by indictment in the circuit court of the county of Coffee, at the spring term thereof, in 1871. The indictment is in the form prescribed in the Revised Code against "card playing at a public place."—Rev. Code, § 3620; *ib.* p. 810, No. 27. The defendants, in the court below, were tried by a jury on the plea of not guilty, and convicted, and fined in the sum of twenty dollars each; for which judgment was entered, and for costs. The parties found guilty were Archibald Lindsey, Alison Jeffcoat and Peter Harrison. There was a bill of exception taken on the trial, from which it appeared that Lindsey and Harrison, and one Lillis, played at a game of cards in the back-room of a store-house in said county of Coffee, where spirituous liquors were retailed, within twelve months before the find-

ing of the indictment. It was also shown that at the same time and place, and in the same room, Jeffcoat and Eiland played at a game of cards, but at a different and another table. These two games were played at the same time, but by different persons, and at different tables, and had no connection with each other. The persons who played at one game took no part with the persons who played at the other game. Each played at independent games. This was in substance all the evidence; and it was received without objection.

On this evidence the court gave two charges, which were excepted to by the defendants. They were as follows:

"1st. That if the defendants played at a game of cards in the back-room of a house where spirituous liquors were retailed or given away, within twelve months before the finding of the indictment in this case, in Coffee county, Alabama, then they were guilty of playing at a public place."

"2d. That if defendants played cards in the back-room of a house where spirituous liquors were retailed within twelve months before the finding of this indictment, and in Coffee county, Alabama, then they are guilty, notwithstanding they may have played at different games, but not together, provided they were all playing at the same time and in the same room."

The charge made in the indictment is a single offense. The defendants are alleged all to have played "at a game of cards." They all participated in the same act, which was forbidden by law. This is the purport of the indictment; and it follows the language of the statute.—Rev. Code, § 3620. A public offense is an act forbidden by law, and punishable as prescribed in the Code or by the statutes.—Rev. Code, § 3540. An indictment is an accusation in writing, presented by the grand jury of the county, charging a person with an indictable offense.—Rev. Code, § 4109. All the persons charged must participate in the same act denounced as an offense, to render them guilty; and the guilt must be proved as charged.—Shep. Dig. p.

56, *Variance*. Here, there was but one act charged—but one playing. Yet the proof showed two acts—two playings. These were each the subject of an indictment. And the evidence which would establish the one act could not establish the other. It would necessarily be variant. And although not objected to on this account, as it might have been, its legal force could not be extended by the charge of the court, beyond its legitimate effect. This, however, is the effect of the second charge above quoted. This charge was improper. There should have been two indictments, as there were two distinct offenses, in which the same persons did not participate.

It is not necessary to consider the other questions raised by the charges asked and refused. They are answered in what is said above.

The judgment of the court below is reversed and the cause is remanded for a new trial. In the mean time said defendants will not be discharged, except by due course of law.

LEVY vs. THE STATE.

[INDICTMENT FOR MURDER.]

1. *City court of Mobile; criminal jurisdiction of.*—The city court of Mobile, within the boundaries prescribed by law, has the same jurisdiction in criminal cases that is conferred upon the circuit court in similar cases.—Rev. Code, § 3930.
2. *Same; power to hold special terms.*—That court, at the discretion of the judge, may hold special terms “to deliver the jail of all persons charged with crimes and offenses.”—Acts 1857-8, pp. 56-7, No. 74, § 3.
3. *Same; jurors for special term, how drawn.*—The petit juries to attend at the special terms of said city court may be regularly drawn as jurors for a regular term of the circuit court, or they may be organized as special juries for the same purpose.—Rev. Code, §§ 4068, 4088.
4. *Same.*—When only a special jury is organized to try a criminal case in the city court at a special term, and no regular jury has been provided,

Levy v. The State.

- it is a sufficient compliance with the law if the list of the special jury is delivered to the prisoner one entire day before the trial.
5. *Same; motion to quash venire, when properly overruled.*—In such case, a motion to quash the *venire*, made by the accused, because no regular jury had been drawn and summoned and a list of their names delivered to the defendant, along with the names of the persons ordered to be summoned as special jurors for the trial, should be refused by the court.
 6. *Confessions of guilt; how to be considered.*—Confessions of a defendant, introduced against him by the prosecution, must be regarded as evidence in the cause, and considered altogether, both for and against the defendant.
 7. *Same; what proper charge as to.*—If the confessions thus let in are sufficient, if believed by the jury, to justify the defendant's acquittal, it is error to refuse so to charge the jury, on the motion of the defendant.

APPEAL from the City Court of Mobile.

Tried before Hon. C. F. MOULTON.

The opinion states the case.

MAYER & TURNER, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

PETERS, J.—This is a prosecution by indictment in the city court of Mobile for the killing of George James. The charge is murder in the first degree. The trial took place at a special term of said city court, and the appellant, said Sam Levy, was found guilty by the verdict of the jury and sentenced to confinement in the penitentiary for life. From this judgment of conviction the defendant brings the case to this court.

The first question presented on the record is a motion to quash the *venire* in the court below, which was refused, and this refusal was made a part of the record by bill of exceptions. The city court of Mobile has the same jurisdiction in criminal cases that a circuit court has in like cases.—Rev. Code, § 3930. And that court, at the discretion of the judge, may order a special term to be held “to deliver the jail of all persons charged with crimes and offenses.” Acts 1857–8, pp. 56–7, No. 74, § 3. In the exercise of its criminal jurisdiction, that court is compelled to have a jury. Const. Ala. Art. 1, §§ 8, 13. This jury may be summoned

under section 4068 of the Revised Code, which is in the following words, to-wit: "When a special term of the court is to be held for the trial of unfinished business, the names of thirty persons must be drawn from the box to serve as petit jurors for each week of the term, and such drawing must take place twenty days before the commencement of the term; when for the trial of a person charged with a felony, fifty names must be drawn, if the offense may be punished capitally, and if not, twenty-four, to serve as petit jurors; and such drawing must take place ten days before the commencement of the term."—Rev. Code, § 4068. In this instance, it seems that no jury was drawn and summoned under this section of the statute. When this is the case, then a special jury may be organized under section 4088 of the Revised Code. This section is in these words: "If, in consequence of any neglect on the part of the judge of probate, sheriff, or clerk of the circuit or city court, or from any other cause, no grand or petit jury is returned to serve at any term of the court, or no petit jury summoned for any week thereof, the court may, by an order entered on the minutes, direct the sheriff forthwith to summon eighteen persons qualified to serve as grand jurors, and the requisite number to serve as petit jurors; and persons so summoned, failing to attend, are subject to the same penalties as if they had been regularly drawn and summoned, to be recovered in the same manner. The court may supply the deficiency, as in other cases, and a jury thus organized is in all respects legal."—Rev. Code, § 4088. The jury in this case was summoned under this last section of the Code. There was no regular jury drawn and summoned to attend upon the court. The number ordered to be summoned was one hundred. This was the largest number allowed by law. Fifty would have been sufficient.—Revised Code, §§ 4173, 4068. A list of the jurors thus summoned was delivered to the accused one entire day before the day appointed for his trial. This was all the law required.—Revised Code, § 4171. There was, then, no regular jury summoned, but a special jury organized in its stead. There

was nothing irregular in this. And the court below properly overruled the motion to quash the *venire*.

The record shows that, in the further prosecution of the cause in the court below, the State offered a witness on the trial who testified as follows, to-wit: "John Battiste, one of the State witnesses, testified that Sam Levy made the following confession to him in relation to the killing of George James: that he and Wash Harris started out on the night of the killing without any intention of doing any one harm; that they accidentally met George James near Cyrus Sullivan's house, and that Harris advanced upon James and struck him with his gun, and then shot him; that upon seeing the stroke and hearing the fire of Harris' gun, he also shot off his gun, but without pointing it at James or intending to hurt any one." There was some other testimony which tended to contradict the truth of this confession; but on charging the jury the learned judge in the court below, on the request of the defendant, refused to instruct the jury that "every part of Levy's confession introduced by the State is evidence for himself; and if the jury believe it to be true, they must find him not guilty." The accused excepted to this refusal of the court to charge as asked, and made the same a part of the record by bill of exception. This was a correct charge, and should not have been refused.—Revised Code, § 2689; *Edgar v. The State*, 43 Ala. 312. If the State lets in the confessions of the accused against him, it becomes a part of the evidence in the cause. And if it tends to acquit the defendant, he is entitled to its benefit. There can be no doubt that the confessions of the defendant, properly made, are evidence against him.—*Franklin v. The State*, 28 Ala. 9, 12; *Brister v. The State*, 26 Ala. 107; *Seaborn v. The State*, 20 Ala. 15. And it is equally well settled, that the confessions of the defendant, when once offered by the State as evidence for the prosecution, are to be taken altogether; and they become evidence for the prisoner as well as against him.—*Rex v. Clewes*, 4 C. & P. 221, 226; *Res-publica v. McCarty*, 2 Dall. Penn. 86; 1 Phill. Ev. C. & H.,

Stillman, Marvin & Hall v. D. C. Dunklin & Co.

and E notes, p. 532, *et seq*, and cases there cited. The action of the court below having been in opposition to law, as thus settled, was erroneous.

Therefore, the judgment of the court below is reversed, and the cause remanded for a new trial. In the mean time the appellant, said Sam Levy, will be kept in custody until discharged by due course of law.

STILLMAN, MARVIN & HALL *vs.* D. C. DUNKLIN
& CO.

[APPEAL FROM ORDER DISMISSING SUIT BROUGHT BY NON-RESIDENT PLAINTIFF,
FOR WANT OF SECURITY FOR COSTS.]

1. *Actions commenced by non-residents ; when should be dismissed.*—All actions commenced by or for the use of non-residents of this State, in the courts of the State, should be dismissed on motion unless security for costs be given previous to the issuance of the summons.
2. *Same ; no limit to right to move to dismiss.*—There is no limitation of time confining this motion to a particular term of the court in which the suit is pending. It may be made at any time before the trial, if the right is not waived.

APPEAL from the Circuit Court of Butler.
Tried before Hon. P. O. HARPER.

The opinion sets forth the facts.

HERBERT & BUELL, for appellants.
JUDGE & HOLTZCLAW, *contra*.

PETERS, J.—Upon the motion of the defendants in the court below, who are the appellees in this court, this suit, in the circuit court, was dismissed, because the plaintiffs were non-residents of this State, and had failed to give security for costs, as required by the statute, before

Stillman, Marvin & Hall v. D. C. Dunklin & Co.

the commencement of the action. The proofs submitted on the motion showed that the suit was commenced on March 15, 1868, upon a promissory note made in this State on the 12th day of September, 1860, and became due in six months after date. The original papers in the case were lost or destroyed after the commencement of the suit; and at the fall term, in 1871, of the circuit court, after the issuance and service of the complaint and summons, the plaintiffs moved the court to substitute copies of the original papers in the cause, which had been destroyed, and at the same time the defendants moved to dismiss the action for want of security for costs. The evidence showed that the cause had been regularly continued from term to term up to the date of these motions, and that both parties had appeared, by their attorneys, in the court below, but no pleas had been actually pleaded by the defendants, and that they had appeared for the purpose of making the motion to dismiss, but no motion had really been made before that time. The court below dismissed the suit on the motion thus made, and taxed the plaintiffs with the costs. From this judgment they appeal to this court, and here insist, by way of error, that the failure to make the motion to dismiss at an earlier day in the court below, by the defendants, was a waiver of their right to do so.

The statute governing this branch of the practice of the circuit court uses this language: "All actions commenced by or for the use of a non-resident of this State, *must* be dismissed, *on motion*, by the court, unless security for the costs be endorsed on the complaint, or lodged with the clerk, previous to the issuance of the summons; and the costs which have accrued must be taxed against the attorney directing the summons to issue; but in case of attachments, such security may be given to and approved by the officer issuing the attachment, or endorsed with his approval upon the writ of attachment."—Rev. Code, § 2802, 2937. This is a peremptory command. Its meaning and purpose are perfectly clear from all doubt. The court has no discretion but to execute it, when called upon to do so

in the proper way; that is, on motion duly made in the cause by a party entitled to its benefit. This is such a right as this court will enforce by *mandamus* in a proper way.—*Ex parte Robbins*, 27 Ala. 71. There is no limitation in the words of the statute, defining when this motion shall or shall not be made. There is no rule of common law which supplies this defect. The language of the act is general. In such a case the court has no power to imply a limitation by construction. This would be equivalent to a judicial amendment of the law, which courts are not authorized to make. It is much safest to stand upon the language of the Code and its *purpose*, which is, that a non-resident plaintiff shall not be permitted to sue in our courts without giving security for the costs “previous to the issuance of the summons.” A violation of this rule subjects the action to be dismissed “on motion.” And as this language may cover and does cover the whole time that the cause is pending in court, from its commencement up to the trial, it leaves all this time for the motion to be made, unless it be waived.—3 Chitt. Gen. Pr. 54, 55, marg. Here the proofs show that there was no waiver of the right and none intended to be made. The learned judge in the court below so decided, and his judgment is free from error, and must stand.—*Harper v. Columbus Factory*, 35 Ala. 127.

The judgment of the court below is affirmed.

VARNER, EX'R, *vs.* CALHOUN, TAX COLLECTOR.

[BILL IN EQUITY TO ENJOIN COLLECTION OF TAX.]

1. *Taxation; what not subject to, under revenue law of 1868.*—Gold and United States treasury-notes on deposit in New York and stocks of foreign corporations, owned by a citizen of this State, are not subject to taxation by the State under any provision of the revenue law of 1868.

APPEAL from the Chancery Court of Macon.
Heard before Hon. B. B. McCRAW.

The facts are sufficiently stated in the opinion.

R. F. LIGON, for appellant.
GUNN & GRAHAM, and ARRINGTON, *contra*.

B. F. SAFFOLD, J.—By agreement of the counsel, two cases between the same parties, dependent upon the same question of law, are considered together.

The appellant filed the bill to enjoin the appellee, as tax collector, from proceeding against him to collect certain taxes which had been assessed in Macon county, on property of his in the State of New York, consisting of gold and United States treasury-notes, and on stocks in incorporated companies out of the State of Alabama. The bill was dismissed for want of equity.

The provisions of the revenue law of 1868, under which the taxes were assessed, are contained in the sixth section, which is an enumeration of subjects of taxation. They are as follows: "19. All money hoarded or kept on deposit subject to order, either in or out of the State," &c. "23. All investments in the stocks of any company or corporation out of this State."

Whether the case was one for the interposition of chancery is not contested by counsel, and we make no decision

on that question. It may not be amiss to say, that while the complainant might have resorted to legal means of resistance or redress, as by defending the possession of his property, or suing the officer for damages, after a sale, the cloud of such a sale upon his property, the multiplicity of suits in which he might have become involved, and the unnecessary vexation of an officer who only sought to do his duty, were considerations which might well invoke the interference of equity.

There is a recognized division of laws into personal and real statutes. The former pertain to the person, and are of general obligation everywhere. The latter have for their object property, and have no extra territorial force or obligation. Under this latter denomination is included our State revenue law. No State would permit the collection of taxes within its territory, by suit or otherwise, for the support of a foreign government. Capital, no less than population, is a welcome immigrant. If the States or countries whence it comes can pursue it for purposes of taxation, the consequent confusion would be inextricable and disastrous. The mere evidence of its ownership, whether a certificate of deposit, or of stock, or other title, though held in this State, is not the property, nor can it change its location.—Story's Conf. Laws, §§ 12, 13, 18, 29; *Bank of Augusta v. Earle*, 13 Pet.

The provisions of the revenue act referred to are inoperative in respect to the property of the complainant specified.

The decree is reversed, and a decree will be entered in this court in compliance with the prayer of the bill.

TAYLOR vs. THE STATE.

[INDICTMENT FOR MURDER.]

1. *Change of venue; practice and rule governing granting of.*—Upon an application for a change of venue in a criminal case, both parties may be heard on affidavits in favor of or against the allowance of the application. And the court will allow the change or refuse it, according to the preponderance of the evidence.—*Ex parte Chase*, 43 Ala. 303.
2. *Same; what not sufficient objection to affidavits.*—It is not a sufficient objection to the affidavits read in support of such an application or against it, that several deponents have signed and sworn to the same statement of facts in one affidavit, if the affidavit is properly certified.
3. *Same; court not bound to hear oral testimony in support of.*—It is not error for the court to refuse to hear oral testimony on an application for a change of venue. Such testimony should be made by affidavit.
4. *Juror, name of as written in list; presumption as to ruling of court as to.*—It is proper to submit to the court the question whether the name of a juror on the list of those delivered to the defendant is properly or improperly spelled. And if upon inspection the court determines that the name is properly spelled, this decision is conclusive, if there is not other proof in the record of its incorrectness.
5. *Self-defense, charge ignoring plea of; when not erroneous.*—On the trial of a defendant charged with murder in the first degree, where the evidence shows that the accused was not forced to take the life of the deceased in order to save his own life or limb from serious peril, and had no reasonable cause to entertain a belief of such necessity to take life, a charge of court which ignores the excuse of self-defense is not erroneous.
6. *Opprobrious words; not excuse for homicide.*—No words, however insulting, will excuse a homicide. There must be peril to life or limb, or reasonable ground to suppose that such peril exists, before the law will permit the taking of life, under the excuse of self-defense.
7. *Same; evidence of, when only admissible.*—Evidence of opprobrious words or abusive language used by the person assaulted, is good in extenuation only when the indictment is for an assault, assault and battery, or affray. Revised Code, § 4198.
8. *Charges as to self-defense; when may be properly refused.*—Where there is evidence showing that a homicide was perpetrated, under circumstances which did not compel the slayer to take life to save his own life or limb from peril, and which also show that the slayer had no reasonable cause to believe in the existence of any necessity to take life, charges as to the law of self-defense are abstract and may be properly refused.
9. *Change of venue: application for, what must state.*—An application for a

Taylor v. The State.

change of venue in a criminal case must set forth specifically the reasons why the person charged with an indictable offense can not have a fair and impartial trial in the county in which the indictment was found, and must also be sworn to by the person so charged, else the court is not bound to hear, or receive or consider it.

Levy v. The State, (at present term,) reaffirmed as to the powers of the city court of Mobile and the construction of the statutes in relation to the organization of petit juries.

APPEAL from the City Court of Mobile.

Tried before Hon. C. F. MOULTON.

The appellant was indicted for the murder of Mack Mitchell, went to trial on plea of not guilty, was convicted of murder in the first degree, and sentenced to confinement in the penitentiary for life.

The murder occurred at a small town in Mobile county called Whistler. The slayer and the slain "were both colored men."

It appears from the bill of exceptions that on the first day of the term the case was called, but on the suggestion of defendant's counsel that he would apply for a change of venue, the court passed the case. On the 18th of March, 1872, the case was called and day set for its trial, and the court then gave the defendant until the 22d of March, and no longer, to file his affidavits and application for a change of venue.

The application for the change of venue states, in substance, that the murdered man was well known and much respected in Whistler, while defendant was a stranger there and comparatively unknown; that the murdered man had many friends and relatives in Whistler, who had greatly exerted themselves to defendant's prejudice; that "one Dennis Brown, an influential colored man, pointed to the fact that defendant had left the State after the murder, as an evidence of his guilt; that said Brown had repeatedly cursed defendant, and has used all his influence, which is great, with the colored people to prejudice them against defendant, and has created great prejudice in their minds against defendant;" that one McGonigle, a white man, has

also been very bitter against defendant, saying he should be hung, and has denounced defendant so bitterly and repeatedly that the minds of the people of the county had become greatly excited and prejudiced against him; for which reason it is impossible for him to have a fair and impartial trial in the county. It is also stated defendant is penniless, has been confined in jail a long time, and has had no opportunity to counteract this prejudice, and no friends to aid him in doing so.

In support of the petition for change of venue, the defendant filed the affidavits of Carson and Daniels. The substance of these affidavits is, that affiants have been residents of Whistler, where the murder occurred; that Mitchell was well known, and had many friends, while defendant was unknown; that affiants had conversed with many people in Whistler, and had never heard any person say a good word for defendant; that the people in the northern part of Mobile county, particularly around Whistler, were greatly prejudiced against defendant. Nothing is said in either of the affidavits as to the feelings of the people in other parts of the county.

The State offered a counter affidavit, which, omitting its caption, was as follows:

"We, the undersigned, having been duly sworn, make oath and say, that we are resident citizens of Whistler in Mobile county, and adjacent thereto, and that we are well acquainted with the people thereof, and of Mobile county; that there is no such prejudice existing in said town of Whistler, nor in Mobile county, that would prevent or interfere with the fair and just trial of the said Solomon Taylor; that the said Solomon Taylor is but little known or talked about, and that the said Mack Mitchell, in his lifetime, was but little known and without any influence; and that his family and friends and relatives are persons without any influence or control over the public mind, or of the people of Whistler or of Mobile county, and are all of no wealth or power in the town of Whistler, or in Mobile county; that the efforts of the said Dennis Brown and of

Taylor v. The State.

McGonigal, as alleged by said Solomon Taylor in his affidavit, have had no effect or influence on the minds of any one, as your affiants verily believe and say, (if the said Brown or McGonigal have ever made any efforts,) and that the said Solomon Taylor can, and no doubt will, have a fair and impartial trial in Mobile county at this time."

This paper was signed by twenty-seven persons. At the foot of the affidavit was the following:

"State of Alabama, } I do hereby certify that the per-
Mobile county. } sons whose names are signed above
were duly sworn to it before me, Hiram Carver, notary public in and for Mobile county, this 26th day of March, 1872.

"HIRAM CARVER,

"N. P. and ex-officio J. P., M. C."

"The defendant then objected to the reception of this paper in evidence, on the ground that the certificate of the justice did not show that the persons who subscribed the same had not made oath thereto. The court overruled the objection, and the defendant excepted.

"The defendant then offered in evidence new affidavits, subsequent to the reading of the affidavits by the State, in support of said application. The court refused to receive the same, and the defendant excepted; the defendant having had, by orders of the court, from the 26th of February to the 22d of March to file his affidavits."

"The defendant then afterwards offered to introduce oral testimony, by the examination of witnesses in open court, in support of said application. The court refused to hear the evidence of said witnesses, and the defendant excepted. The court then refused, after considering the evidence, to grant defendant a change of venue, and the defendant excepted.

"The defendant then, afterwards, offered another and additional application for a change of venue, containing allegations entirely different from those in the first application, which the court refused to hear, to receive, or to consider. To which ruling the defendant excepted."

This second application is not set out or in any way made

part of the records. The bill of exceptions makes no other mention of it, or of the additional affidavits, than as stated above.

The defendant then made a motion to quash the *venire*, based upon facts the same in substance as those in *Levy v. State*, (at present term,) on page 171 of this volume. This motion the court overruled.

"The defendant then exhibited the list of the jurors that had been served upon him, and showed that the same was written with a lead pencil, and that two names thereon were illegible, and for these reasons objected to being tried with said *venire*. The court overruled the objection, and the defendant excepted. The court ordered the two names so questioned to be omitted, and ordered four other jurors to be summoned, which was done after the regular *venire* was exhausted. F. W. King was then called as one of the jurors to try defendant, to whom defendant objected on the ground that the name was written in the list served upon him "J. F. W. King," with the "J" partly erased with a rubber, though the outlines of the letter were distinct, but exhibited signs of erasure, and exhibited his list to the court showing the same. The court overruled the objection, (because, on inspection of the list of names, it appeared to the court that the name of F. W. King was plainly written, and defendant accepted the juror to try the case,) and the defendant excepted."

But two witnesses were examined as to the killing. The first witness for the State testified, in substance, that "one night in the spring of 1870, the month not remembered by the witness, the defendant, Solomon Taylor, Haywood White and Mack Mitchell were in a room belonging to Haywood White and adjoining a barber shop of his, in which the defendant was employed and worked. They were engaged in playing cards—poker, five cents ante. During the playing of one of the hands, witness and Mack Mitchell drew out of the game, leaving White and the defendant in it. (In the meantime Dennis Brown had entered the room, thrown himself on a bed therein, and gone

to sleep). While this hand was being played, the defendant accused Mitchell of stealing a card from the deck and giving it to his opponent, White. Mitchell responded by calling defendant a liar. The latter repeated the charge, when Mitchell responded again, more excitedly, calling defendant a damned liar. An altercation of words then ensued between Mitchell and the defendant, during which Mitchell said, 'if you don't like it, help yourself.' Defendant replied, 'I will help myself,' and immediately left the room, went into the room adjoining, and in about five minutes returned (the witness stated on cross-examination it might have been one minute) with a double barreled shot-gun to the door of the room, and pointed it at Mitchell's head. He said to Mitchell, 'Do you mean it?' Mitchell, without answering, sprang towards the defendant, for the purpose, as witness thought, of grasping the gun, when the gun was fired by the defendant, the load from which entered the head of Mitchell and caused his death in half or three-quarters of an hour. Mitchell was sitting with his back against the wall, nearly opposite the door at which defendant appeared with the gun. When he was shot he fell with his head outside of the door, or near the door, at which the accused stood when he fired, and a pool of blood from the wound was formed in the passage without the door. Taylor was standing when the shot was fired."

Deceased had no weapons about him, nor had the parties any grudge. The card players had been drinking from a bottle of whisky, but none of them were drunk or under the influence of liquor. Deceased was a larger and stouter man than defendant.

The other witness to the killing testified, that after watching the game for some time, he went to sleep on a bed in the room; that "when he awoke the accused was standing at the door of the room with the gun, saying something witness did not understand, in a loud voice, which caused witness to wake. Accused had a gun in his hand; witness did not know at whom it was pointed; he tried to catch hold of the gun and take it from Taylor; it fired before he

got to it. He heard something fall, turned around, and discovered Mack Mitchell lying upon the floor. Witness did not see Mitchell springing towards Taylor when he was shot, but Mitchell was sitting in his chair and fell at the foot of it."

This was the substance of the testimony, with the exception of the evidence of the physician who examined the wounds upon deceased, and some proof of peaceable and law-abiding character of defendant, none of which need be further noticed.

The court, at the request of the State, charged the jury—

1st. "If you find from the evidence that the only cause or apology that defendant had for killing Mack Mitchell was insult by mere words, and not otherwise, that would not avail him anything."

2d. "It is the duty of the court to say to you that in this case the law of self-defense does not arise."

The defendant duly excepted to the giving of each of the above charges, and then requested in writing the following charges, each of which the court refused to give, and to each of which refusals defendant excepted:

"1st. If the jury find that the act of killing was performed in a moment of strong passion, precluding the idea of coolness and premeditation, the defendant would not be guilty of murder in the first degree.

"2d. If the jury believe from the evidence that the defendant fired the shot which killed Mack Mitchell under the influence of strong passion, induced by an assault connected with opprobrious words, they can only find him guilty of manslaughter in the first degree.

"3d. While mere words and threats will not reduce the crime of murder to that of manslaughter, yet when they are accompanied with evidence of an assault upon the prisoner on the part of the deceased, this rule of law will not apply, and the jury are instructed to consider, from the facts of the case, whether or not the malice necessary to make the offense murder, existed in the mind of the prisoner at the time he committed the act.

"4th. If Mack Mitchell was rushing toward defendant at the time he shot, and defendant believed, or had reason to believe, that he would receive great bodily harm from him unless he shot in self-defense, the jury must find him not guilty.

"5th. While passion without provocation, or provocation without passion, will not make the crime less than murder, yet passion without provocation may reduce the crime from murder in the first degree to murder in the second degree."

The various rulings of the court to which exception was reserved are now assigned as error.

MAYER & TURNER, for appellant.—1. The court erred in not receiving the additional affidavits. It was the only way defendant could rebut the facts sworn in the affidavit offered by the State. The defendant could not know how much or what testimony was necessary until the State's counter-affidavits were filed.

2. Oral testimony should have been received in support of the application. It is a much better way to test the witnesses; each party may examine the witness, and the court be better enabled to judge of the facts in issue. The necessity for the charge is to be established or refuted by like proof, as in other cases.—45 Ala. 43.

3. An inspection of the affidavits for the State will show that the affidavits of the State do not disprove many allegations of the application—they are not positive in stating that defendant could have a fair and impartial trial; nor are the facts accounting for the prejudice denied.

4. The court erred in not hearing the second application for change of venue; the right exists at any time before the trial. It might have been that the second application was based on facts which had just then come to the knowledge of the defendant. How can the court tell, without hearing the application?

5. The first charge given by the court was calculated to mislead the jury. It may be true that insult would not palliate the offense if, notwithstanding the insult, it was

Taylor v. The State.

done with deliberation and premeditation, two ingredients necessary to make murder in the first degree. But if, as the consequence of the insult, the prisoner's mind was so affected at the time he committed the act that it was performed without deliberation or premeditation, it would not be murder in the first degree. The jury must ascertain, as a matter of fact, that the act was committed with deliberation and premeditation. Any fact that will shed light upon this subject may be looked to by them, and constitutes legitimate proof for their consideration. Wharton's Am. Law of Homicide, 369; *Swan v. State*, 4 Hump. R. 136; *Pirtle v. State*, 9 Hump. R. 663; *Haile v. State*, 11 Hump. R. 369.

The second charge given was erroneous. The only witness who saw the entire transaction testified that "he (deceased) sprang forward, as witness thought, to grasp the gun." It was the legitimate province of the jury to determine whether or not the witness thought correctly, or whether the springing forward of the deceased was the assault of a full grown, matured and powerful man, upon a boy seventeen years of age. If the latter, the court could not say that the law of self-defense might not arise.

The first charge asked by defendant should have been given.—17 Ala. 587; 23 Ala. 17.

The second charge asked was proper.—Walker's American Crim. Law, 509-10.

The third charge asked should have been given.—1 Hale, 449, 456; Parker, J., in Selfridge's trial, 158; 2 Richardson Law, 34; 18 Ga. 17.

JNO. W. A. SANFORD, Attorney-General, *contra*.

PETERS, J.—This is an indictment for murder in the first degree, in the city court of Mobile, tried at a special term of said court, in the year 1872. The appellant, said Solomon Taylor, was found guilty, and sentenced to confinement in the penitentiary for life. From this conviction he appeals to this court.

The motion to quash the *venire* is the same in effect with

that made in the case of *Sam. Levy v. The State*, (decided at the present term.) We see no reason to depart from the construction of our statutes upon the organization of petit juries returned to the special term of the city court of Mobile, laid down in that case. It is therefore adhered to and re-affirmed.—*Sam. Levy v. The State*, (at present term.)

I am unable to discover error in the action of the court below, in the refusal of the application to change the venue of the trial. Whether the facts upon which the place of trial was sought to be changed existed or not was a question for the court, upon the proofs submitted on both sides. The preponderance of the evidence is strongly against the accused. The form of the affidavits against the application, though somewhat unusual, is not a form forbidden by law. It is open as well to the defendant as to the State. I am not familiar with any principle of law or practice which vitiates an affidavit because it is sworn and signed by more than one person. As many persons as choose to do so, may swear in the identical same words and verify their oaths by their signatures, and whether the oath is written on one or many pieces of paper, makes no difference. Such an affidavit made before a notary public in this State is sufficient. Under our law a notary public is a justice of the peace, and as such he may administer an oath.—Const. Ala. Art. VI, § 13; Rev. Code, § 841, 1083, 4206; *Ex parte Chase*, 43 Ala. 303. One of the series of affidavits offered by the prosecution is signed by *twenty-seven* persons, and it is sworn and subscribed before a "notary public and *ex-officio* justice of the peace," and it is so certified by that officer to the court. This is sufficient. There was no error in refusing the motion to reject it.

The motion to hear oral testimony on the application for a change of venue was unusual. There is no mode of procedure fixed by the statute, but the mode of proof by affidavit is the customary practice, and it is that indicated in *Ex parte Chase*, (43 Ala. 303, 312.) It was also the prac-

tice in like cases at common law.—3 Bla. Com. p. 304; *Motions and Affidavits*, 3 Chitt. Gen'l Pr. p. 571, *et seq.*; *Motions*, 1 Tidd's Pr. 478, *et seq.*; 11 Bouv. Law Dict. p. 199; Motion, and authorities there cited. The court, then, did not err in rejecting the oral testimony.

In the selection of the jury on the trial below, the defendant complained that the name of one of the jurors in the list delivered to him was written "J. F. W. King." There had been an effort to rub out the J. The true name was F. W. King. The court, upon inspection, decided that the name of "F. W. King was plainly written" on the list of jurors delivered to the defendant, and upon this inspection the motion to strike out the name of King was refused. To this the defendant excepted. There was nothing wrong in this refusal. The court is the only judge in such a case, and unless the proofs show that it was perversely mistaken, his judgment is final. There is nothing in the record showing that its judgment was incorrect. There was, then, no error in the refusal complained of.

I have carefully examined the charges of the court on the trial below, both those given and excepted to, and those asked and refused, and I am unable to detect any error in either. The charges which are given, and those that are asked by the defendant, must always be referred to the offense alleged in the indictment, and the evidence by which it is intended to be supported or denied. Otherwise, they are liable to transcend the limits of the issue and become separated from it. Such charges are abstract. They are too broad or too narrow for the issue or the proofs. The offense in this case is a felonious homicide. There was no evidence tending to show that it had been committed in necessary self-defense. The assault was altogether on the side of the slayer. He was the assailant, not the person assailed. His resort to his gun was for redress and not for self-defense. One may prevent an injury from being done, by all proper means; but when done he may not take redress in his own hands.—Walker's Amer. Law, p. 210, § 87, 5 Ed. No words, however

insulting, will excuse a homicide, nor will an assault which has been occasioned by the slayer. There must be peril to life or limb, or reasonable ground to suppose that such peril exists, before life can be taken under the excuse of self-defense.—*Oliver v. The State*, 17 Ala. 597; 1 Russ. on Cr. p. 669; Whart. Amer. Law of Homicide, p. 168, *et seq.* Evidence of opprobrious words or abusive language, used by the person assaulted, is good in extenuation or justification only when the indictment is for assault, assault and battery, or affray.—Rev. Code, § 4198. It is not permissible on the trial of an indictment for an offense of a higher grade. Here, the deceased and the defendant had been engaged in playing a game of cards. The defendant accused the deceased of “stealing a card from the deck” and giving it to his opponent, one White. This charge was rudely denied by the deceased, and the denial repeated by calling the defendant “a damned liar.” After this, the defendant quit the room in which the gaming and altercation had taken place, and soon returned with a double-barrelled gun and shot the deceased in the head, which occasioned his death within an hour after the infliction of the wound. Under such a state of the proof there was no grounds for the plea of self-defense, or such an extenuation of the crime as to reduce it from the grade of murder in the first degree to manslaughter. The court did not, then, err in the charges given, which ignored the plea of self-defense, nor in refusing the charges which sought to reduce the crime from murder in the first degree to manslaughter. The charges asked were not supported by the evidence. They were abstract, and properly refused.

The judgment of the court below is therefore affirmed, and that court will proceed to execute its sentence according to law.

NOTE BY REPORTER.—At a subsequent day of the term the appellant filed an application for rehearing, which did not come into the Reporter's hands. It was responded to as follows :

PETERS, J.—This is an application for rehearing. The

ground is, as I understand the petition, the failure of this court to notice the second application for a change of venue, as shown in the record.

The record shows that there was one application for change of venue, founded on affidavits in support of the motion in the usual form. This was heard and refused, and the refusal excepted to. This refusal was approved by this court. But after this refusal and exception, the record goes on immediately to recite as follows, to-wit: "The defendant then *afterwards* offered another and additional application for a change of venue containing allegations entirely different from those in the first application, which the court refused to hear, to receive or to consider. To which ruling the defendant excepted." This is all that is said in the record upon this subject. This does not show such an application as the court was bound to notice. A mere reading of the Code will show this. I quote the statute. It is in these words: "Any person, charged with an indictable offense, may have his trial removed to another county, on making application to the court, *setting forth specifically* the reasons why he can not have a fair and impartial trial in the county in which the indictment is found, *which application must be sworn to by him.*"—Rev. Code, § 4206. This is the rule. And it must appear from the record that it has been complied with, before the court below can be presumed to have been in error. The above application does not show that the above requirements of the law were complied with. A mere application is not enough. It must set forth the reasons required by the statute, and must be sworn to by the person charged, else the court is not bound to entertain it. Nothing is intended to be said in this opinion as to the right of the defendant to make a second application, at the same term of the court at which the first has been refused. This question is wholly pretermitted. It is only intended to point out, in this opinion, what is required by law in the first application, to fix error upon the court for a refusal to consider it and decide upon it.

The rehearing is denied with costs.

SHULMAN, GOETTER & WEIL vs. BRANTLY & COPELAND.

[MOTION TO AFFIRM JUDGMENT ON CERTIFICATE.]

1. *Appeal to supreme court; law determines to what term is taken.*—The law determines to what term of the supreme court an appeal is to be returned, and not the certificate of the clerk.
2. *Same; to what term appeals must be made returnable.*—The appeal is to be made returnable to the next term of the supreme court after it is taken; and such should be the citation in error served upon the opposite party. Rev. Code, § 3488, 3492.
3. *Appeal, clerk's certificate of; what should show.*—The clerk's certificate of appeal should show that an appeal has been taken, and when it was taken; if it goes beyond this, it is surplusage.—Rev. Code, § 3485, 3509; Sup. Court Rules, No. 22.
4. *Judgment; when not affirmed on certificate.*—The judgment of the court below will not be affirmed on certificate, when it appears that the date of taking the appeal, as shown by the certificate, is subsequent to the term of court at which the motion of affirmance is made.
5. *Same; practice as to.*—In such case, the cause will be permitted to be docketed, but it will not stand for trial until the next succeeding term of the court.—Rev. Code, § 3498.
6. *Cases modified and limited.*—*Cowles v. Frear*, 43 Ala. 642; and *Willingham v. Harrell*, 34 Ala. 680; modified and explained.

This was a motion to affirm a judgment on certificate, &c.

JOHN D. GARDNER, for motion.

PARKS & HUBBARD, *contra*.

PETERS, J.—This is a motion to affirm the judgment of the court below, on the certificate of appeal. The certificate shows that the appeal was taken on the *eighth* day of June, 1872. This was after the commencement of the present term of this court, yet the certificate of the clerk certifies that the appeal was taken “to the present term of the supreme court of Alabama, now in session at Montgomery.” A more careful examination of the statute upon

Shulman, Goetter & Weil v. Brantly & Copeland.

the subject of appeals satisfies my mind that the clerk has no authority to make any such declaration in his certificate. It is, therefore, mere surplusage.—3 Pet. 12, 29; 4 How. 522; 13 Pick. 172. Generally, in civil proceedings, matter of surplusage will not be permitted to work injury to the parties to the suit on either side.—2 Johns. Cas. 52; Coke Litt. 3030; 13 Johns. 80; 1 Pet. 18; 1 Ala. 326. Then, this allegation does not affect the rights of the parties to this suit in any way, and the certificate may be considered as if it had been stricken out. The statute requires, on taking the appeal, that the clerk “must certify the fact that such appeal was taken, and the time when, as a part of the record, which gives the supreme court jurisdiction of the case.”—Rev. Code, § 3485. A subsequent section of the statute shows that such an appeal, by operation of law, and not by the clerk’s certificate, is made returnable “to the next term of the supreme court,” after the date of taking the appeal. This is to be inferred from the character of the notice of the appeal, required to be issued and served on the opposite party. The direction of the Code is as follows, to-wit: “The register, clerk of the circuit court, and judge of probate, must, on the application of either of the parties, their agent or attorney, after final judgment or decree in any cause, upon an appeal being taken, issue a citation, returnable to the next term of the supreme court, to the opposite party, which must be served by the sheriff on him or his attorney, ten days before the term of the court to which the appeal is taken.” Rev. Code, § 3488. The same phraseology is used in reference to the term of the court, in a subsequent section of the Code, in reference to making out the transcript of the record in case of appeals. By this, the clerk is required to “make and deliver” to the appellant, “in time to be returned to the *next term* of the supreme court, a full and complete transcript of the record and proceedings in the cause, together with his certificate that the appeal was taken, and the time when, and the citation and a copy of the appeal bond, if any was given, with his certificate, that

it is a complete transcript of all the proceedings in the cause."—Rev. Code, § 3492. This language would be without meaning, unless the law makes the appeal returnable to the next term of the supreme court after it is taken. If this is so, then the clerk's certificate can not alter it. This is doubtless the correct construction of the statute, notwithstanding what is said in the case of *Cowles v. Frear*, (43 Ala. 642,) and *Willingham v. Harrell*, (34 Ala. 680.) To this extent these cases are to be considered as modified. The certificate upon which the affirmance is asked in this case, at this term of this court, is insufficient. The cause is not properly in this court for adjudication at the present term; and no judgment of affirmance can be now rendered. But the transcript of the record may be filed, and the cause will stand for trial at the next term of this court. Rev. Code, § 3498; Sup. Court Rules, Nos. 22, 24, 25, 26.

The motion for affirmance of the judgment of the court below is denied, with costs.

BURNS vs. THE STATE.

[INDICTMENT FOR SOLEMNIZING RIGHTS OF MATRIMONY CONTRARY TO LAW.]

1. *Revised Code, §§ 3602 and 3603; unconstitutionality of.*—Sections 3602, 3603, of the Revised Code, which prohibit the inter-marriage of white persons and negroes, and forbids any person, authorized to solemnize the rites of matrimony, to do so in such cases, when applied to citizens of the United States, or of the State, are in contravention of the act of congress of April 9, 1866, known as the "civil rights bill," and repugnant to section 1 of the 14th amendment to the Federal constitution, and to art. 1, § 2, of the State constitution.
2. *Citizenship; what rights confer.*—The promotion to citizenship of persons before excluded, is an admission of them to all the rights and privileges of other citizens in the same manner and to the same extent.
3. *Same.*—The persons who acquired citizenship under the 14th amendment, and the State constitution, can not be distinguished by legislation

from the former citizens, for any of the causes which previously characterized their want of citizenship.

4. *Overruled case.*—*Ellis v. The State*, 42 Ala. 525, overruled as to this point.

APPEAL from the City Court of Mobile.

Tried before Hon. C. F. MOULTON.

The facts are sufficiently stated in the opinion.

R. & O. J. SEMMES, for appellant.

JNO. W. A. SANFORD, *contra*.

[No briefs reached the Reporter.]

B. F. SAFFOLD, J.—The appellant was convicted and fined under an indictment, charging him as a justice of the peace, with solemnizing the rites of matrimony between a white person and a negro, contrary to the provisions of sections 3602, 3603 of the Revised Code. It is contended for him that these statutes are superseded by an act of congress, passed April 9, 1866, "to protect all persons in the United States in their civil rights, and furnish the means for their vindication;" and also, that they are in violation of both the State and Federal constitutions.

The first section of the act is in the following words: "All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every State and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any

law, statute, ordinance, regulation or custom to the contrary, notwithstanding." The second section imposes punishment on any person who, under color of any law, statute, &c., subjects or causes to be subjected, any inhabitant of any State or territory to the deprivation of any right secured or protected by the act.

In *Ellis v. The State*, (42 Ala. 525,) it was held that there is no conflict between this act and the sections of the Revised Code referred to.

Marriage is a civil contract, and in that character alone is dealt with by the municipal law. The same right to make a contract as is enjoyed by white citizens, means the right to make any contract which a white citizen may make. The law intended to destroy the distinctions of race and color in respect to the rights secured by it. It did not aim to create merely an equality of the races in reference to each other. If so, laws prohibiting the races from suing each other, giving evidence for or against, or dealing with one another, would be permissible. The very excess to which such a construction would lead is conclusive against it.

It is self-evident that an inhabitant of a country, proscribed by its laws, approaches equality with the more favored population in proportion as the proscription is removed. The supreme court of the United States, in the *Dred Scott* case, (19 How. 393,) decided that a free negro, of the African race, whose ancestors were brought to this country and sold as slaves, was not a "citizen" within the meaning of the constitution of the United States. In proof of this, for the constitution did not so declare at that time, Chief Justice Taney, with much stress, referred to the laws of many of the States, prohibiting marriage between such persons and the white population. It can not be supposed that this discrimination was otherwise than against the negro, on account of his servile condition, because no State would be so unwise as to impose disabilities in so important a matter as marriage on its most favored citizens, without consideration of their advantage.

Dred Scott was not allowed to sue a citizen because he was not himself a citizen. One of the rights conferred by citizenship, therefore, is that of suing any other citizen. The civil rights bill now confers this right upon the negro in express terms, as also the right to make and enforce contracts, amongst which is that of marriage with any citizen capable of entering into that relation.

It is no argument against this conclusion that many citizens are debarred from rights and privileges allowed to others, as is the case with married women and children. The power to regulate society is interwoven with the duty to preserve it. But on account of the abuse to which this power is subject, communities, as they increase in knowledge of the science of government, find it necessary to limit and restrain it by provisions of their fundamental law. Whether congress, at the time it passed the civil rights bill, had authority to do so or not, which is gravely questioned in the Dred Scott case, there can be no doubt that its cardinal principle is now declared by the 14th amendment to the Federal constitution. The first section of that article proclaims that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws." The spirit and express declaration of this section are, that no person shall be disfranchised, in any respect whatever, without fault on his part, except for his own good, reasonably apparent, and that the persons who acquire citizenship under it shall not be distinguished from the former citizens for any of the causes, or on any of the grounds, which previously characterized their want of citizenship. The second section of article 1 of our State constitution, is to the same effect. The indictment fails to charge any offense, and the facts set

forth in it show that no prosecution can be sustained against the defendant.

The judgment is reversed, and an order will be made in this court to discharge the accused.

SCHUSTER vs. THE STATE.

[INDICTMENT FOR BETTING AT KENO.]

1. *Selma, city of; charter does not authorize to license gaming.*—The mayor and councilmen of the city of Selma have no authority, under the charter of said city, to license a keno table, to be kept for gaming.
2. *Indictment for betting at gaming table; what evidence irrelevant.*—On the trial of an indictment found in the criminal court of the city of Selma, for betting at a gaming table for gaming, or at a game called keno, evidence offered by the defendant that at the time of the playing the keno table had been licensed by the said city, is irrelevant, and to exclude it is not error.
3. *Same.*—So, too, evidence that it was the public impression in Selma that the said table had been licensed, and that it was no violation of law to bet at it, is irrelevant, and should be rejected.
4. *Charge to jury as to intent with which act was done; what should be refused.* On the trial of such indictment, the following charge, asked by the defendant, should be refused, to-wit: "If defendant, if he did bet, had no intention to violate the law of the State, the jury must acquit him."

APPEAL from the Criminal Court of Dallas.

Tried before Hon. GEORGE H. CRAIG.

The opinion states the facts.

GAYLE, for appellant.

JOHN W. A. SANFORD, *contra*.

[No briefs reached the Reporter.]

PECK, C. J.—Betting at a gaming table for gaming, or at a game called keno, is an indictable offense in this

State.—Revised Code, § 3622. The indictment in this case was found in the city court of Selma, Dallas county, and is in the following words, to-wit: “The grand jury of said county charge, that, before the finding of this indictment, J. B. Schuster bet at a gaming table for gaming, or at a game called keno, against the peace and dignity of the State of Alabama.”

Under this indictment the defendant, appellant, was tried and convicted, and fined fifty dollars. On the trial, the defendant offered to prove that, “at the time of said playing, the keno table had been licensed by the city of Selma.” This evidence the court rejected as irrelevant, and he excepted. The defendant also offered to prove “that it was the public impression in Selma that the gaming table was licensed, and that it was no violation of law to bet at it.” This evidence was rejected, and the defendant excepted.

The defendant did prove “that said game had been run, or carried on, in Selma since the summer in 1868, and that it was generally and openly frequented.” The bill of exceptions then states, “the case being thus before the jury, the defendant asked the court to charge the jury, that if Schuster, if he did bet, had no intention to violate the law of the State, they must acquit him.” This charge the court refused, and defendant excepted.

The defendant appeals to this court, and insists that the court erred in rejecting the offered evidence, and in refusing to charge the jury as requested.

Whether the game called keno is played on a gaming table called a keno table, I do not know, but suppose it is, as the defendant offered to prove that, “at the time of the playing, the keno table had been licensed by the city of Selma.” If the city of Selma had no authority to license a gaming table for gaming called a keno table, then it is very certain the offer to prove the fact was irrelevant, and the evidence offered was properly rejected.

Had the city of Selma any authority to license such a table for gaming? Not unless the authority to do so is *clearly conferred* by its charter. On the 10th day of Octo-

ber, 1868, an act was passed entitled "An act to establish a new charter for the city of Selma."—Book of Acts 1868, page 227.

By section 18 of said act it is, among other things, declared that the mayor and councilmen of said city shall have full power and authority "to provide for licensing and regulating retailers of liquors within the limits of said corporation, and to fix the sum to be paid for the same, and annulling the same, on good and sufficient complaint being made against the person holding such license; for the regulating hackney-coaches, carriages, wagons, carts, and drays, and for licensing the same; and for the regulating of pawn-brokers within the city; *to restrain or prohibit gambling*, and to provide for licensing and regulating cock-fighting, or pits, theatrical and other public amusements within the city." Said section concludes as follows, to-wit: "and to pass all such resolutions, by-laws and ordinances as they, or a majority of them, may deem requisite and necessary for the good government of the said city, *not contrary to the laws of the State of Alabama.*"

If the closing part of this section were omitted, we think, by no reasonable interpretation of the words "*to restrain or prohibit gambling*," can they be held to confer on the mayor and councilmen of said city the authority to license a keno table, to be kept for gaming.

So far as we know, by the laws of this State, no such table kept for gaming is, or can be "regularly licensed," but, on the contrary, to keep or exhibit, or to be interested or concerned in keeping or exhibiting such a table for gaming, is a high misdemeanor; and, by said section 3622, to bet or hazard any money, bank-note, or other thing of value, at a game called keno, is expressly declared to be an offense for which, on conviction, the guilty party is to be fined in a sum not less than fifty dollars. But the defendant's counsel insists, and says, "the charter gave the city the power 'to restrain or prohibit gambling,' and if a license was granted to run a game of keno, it must have been, and was, a license in *restraint* of gambling, by the imposition

of a heavy tax. As the power to restrain or prohibit is disjunctively given, it is a proper interpretation of the charter to say the city had the power to license under *restraint*." We can not yield our assent to the correctness of this reasoning. These words, "to restrain or prohibit gaming," must not be so construed as to confer a power in conflict with the laws of the State, and any construction that does so, can not be the true construction; and, as the laws of the State make it an offense to keep a keno, or any other like table for gaming, or to bet at a game called keno, these words should not be held to confer on the mayor and councilmen of said city the power to license and make lawful what the laws of the State declare to be an offense. We think it fair to presume, if it had been the intention of the legislature to confer on the city the power to license gaming, they would have used the appropriate words for that purpose, as they have done, not only in the same section, but also in the same sentence, in relation to retailing, cock-fighting, &c. For these reasons, we hold that the words, "to restrain or prohibit gaming," as here used, do not mean to *license or prohibit gaming*; therefore, the evidence offered to prove that, at the time of the playing, the keno table had been licensed, &c., was irrelevant, and for this reason was properly excluded.

2. The court committed no error in refusing to permit the defendant to prove "that it was the public impression in Selma that the gaming table was licensed, and that it was no violation of law to bet at it." Public impression can not make that lawful, which the laws of the State declare to be unlawful; nor will such public impression excuse any one who violates the laws under its influence.

3. Nor did the court err in refusing to charge the jury, that if defendant, if he did bet had no intention to violate the law of the State, they must acquit him. It may be conceded that, generally, an unlawful intent is necessary to make out an offense, but if the absence of an unlawful intent arises out of an ignorance of the law, it will be no excuse. The maxim is, "ignorance of fact excuses, but

ignorance of the law does not excuse." Thus, if a man intending to kill a thief, or house-breaker, in his own house, and under circumstances which would justify him in so doing, but by mistake kills one of his own family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so, this is willful murder. For, a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is, in criminal cases, no sort of defense.—Broom's Legal Max. m. p. 264. This author also says, "every man is presumed to be cognizant of the statute law of this realm, and to construe it aright; and if any individual should infringe it through ignorance, he must, nevertheless, abide by the consequences of his error. It will not be competent to him to aver, in a court of justice, that he has mistaken the law, this being a plea which no court of justice is at liberty to receive."

It is manifest, that the absence of an unlawful intent on the part of the defendant in this case, if in fact it existed, grew out of his ignorance of the law, that is, because he believed it was lawful for the city authorities of Selma to license the said keno table for gaming, and being licensed, as he believed, it was lawful for him to bet at it. In both of these points of law he was mistaken, and, as said author says, he must abide the consequences of his error.

The judgment is affirmed, at appellant's costs.

HUDSON *vs.* STEWART, ADM'R.

[PETITION TO SET ASIDE SALE OF LAND.]

1. *Exempt property of decedent; what, child may claim.*—If a person die, in this State, and leave no widow, and but a single child, who is his sole and only heir and distributee, five hundred dollars worth of the land of the deceased is exempt from the payment of such decedent's debts, for the child's use.
2. *Same; rights of child when estate is insolvent.*—And when the estate is insolvent, and it becomes necessary to sell the real estate for the payment of debts, the land so exempt should be laid off and set apart for such child, in the manner required by the statute. And if the land can not be divided, it must be sold, subject to this claim of exemption.—Revised Code, § 2061, Cl. 6.
3. *Same.*—And if, when the land is so offered for sale, it fails to sell for five hundred dollars, the sale should not be confirmed, as the child is entitled to the five hundred dollars on the land.
4. *Same; proof of insolvency of estate; what competent evidence to prove.*—On an application by petition, in favor of such child, it is not necessary, in order to show the insolvency of the estate, that there shall be a judgment of insolvency in the probate court, but it is enough, "when the estate is ascertained to be insolvent, upon evidence satisfactory to the probate judge."—Revised Code, § 3539, G. p. 671.
5. *Same.*—On such an issue of insolvency, *vel non*, the evidence of the administrator is competent, without a judgment of insolvency, and it should not be rejected.
6. *Same; petition of child should not be dismissed for irregularities, &c.*—When the petitioner is a female and a minor, her petition should not be dismissed for any irregularity or informality, which would be amendable. The court should direct the petition to be properly amended, if it was deemed insufficient. Its dismissal is to be looked upon with grave disfavor, in such a case.

APPEAL from the Probate Court of Perry.

The opinion states the case.

BROOKS, HARRALSON & ROY, for appellant.

W. L. BRAGG, *contra*.

PETERS, J.—This is a proceeding originating in the probate court of Perry county, to set aside a certain portion of the real estate of W. O. Hudson, dec'd, for the use of Amelia Hudson, his only child and distributee, who is a minor. The suit is instituted in Miss Hudson's name, by her next friend, under section 2061 of the Revised Code, as amended by section 3539, G., of the same compilation. There was also pending, before the same court, at the same time, an application for the sale of the same lands, for the payment of the debts of the decedent, (said Hudson.)

At the hearing, the appellant's petition was dismissed on the motion of the administrator, "on the ground that the estate" of the decedent, (Hudson,) had "not been judicially ascertained to be insolvent." There was a bill of exceptions taken by appellant on the trial below, from which it appears that the petitioner, (Miss Hudson) was a minor of nine years old, a child of said W. O. Hudson, deceased, and the sole survivor of his family; and that there was no widow of deceased living. The petitioner also offered to prove that the estate was actually insolvent, by the administrator, but the court rejected this testimony, and petitioner excepted. And then, on motion of the administrator, the proceeding was dismissed. From the judgment of dismissal, appellant brings the case to this court, and assigns the dismissal for error.

The sections of the Code which control this case are as follows: "When the deceased leaves a widow, or a child, or children, under the age of twenty-one years, members of his family, the following property, *real* and personal, is *exempt from payment of debts*, and the same, with the exception of real estate, is exempt from the claims of heirs, distributees and legatees, and the real estate is exempt from such claim of heirs, distributees and legatees only when the estate of the deceased is insolvent, and it becomes necessary to sell the real estate for the payment of debts."

* * * * *

"6. Five hundred dollars worth of land, — and when the estate is insolvent and it becomes necessary to sell the

Hudson v. Stewart, Adm'r.

real estate for payment of debts, three appraisers, appointed by the court, after being duly sworn, must lay off and set apart the same, so as to include the homestead, or such portion thereof as can be selected without injury to the remaining portion of the estate ; and if this can not be done, they must lay off other lands in the place thereof, to be estimated by them and set off by the metes and bounds, and the title to such lands shall vest in the widow and child, or children, or in the widow if there be no children, or in the child or children, if there be no widow ; and if the real estate can not be divided so as to set apart five hundred dollars worth thereof, under this section, and the appraisers shall so report, the probate court must order the executor or administrator to sell the real estate and pay to such widow, or widow and child, or children, or child or children, five hundred dollars of the proceeds of the sale.”—Rev. Code, § 2961, cl. 6. “Real estate of decedent, set apart for the use of the widow, or widow and child or children, or child or children, under the provisions of section 2061, (1738,) is exempt from the claims of heirs, distributees or legatees, only when the estate is ascertained to be insolvent, *upon evidence satisfactory* to the probate judge, and it becomes necessary to sell the real estate for the payment of debts ; and this section is amendatory of section 2061, (1738.)”—Rev. Code, § 3539, G. p. 671.

The proceedings in the court below show that the appellant is the only child, the only heir, distributee or legatee, and the only surviving member of the decedent's family, and that there is no widow. In such a case there can be no controversy between the heirs, distributees or legatees of the deceased. Under such facts, the exemption vests solely in the appellant, and whether the estate is solvent or insolvent, it can not defeat the right of the petitioner in the court below. The insolvency of the estate only defeats the exemption in favor of the claims of heirs, distributees or legatees, when there are such, against the family and widow. It does not enlarge the rights of the creditors. It is only when there are other heirs, distributees

or legatees, that the insolvency of the estate becomes of importance.—See *Thornton v. Thornton*, 45 Ala. 274; Rev. Code, § 1061, 3539, G., *supra*. Here the contest is between the creditors of the deceased and the only surviving member of his family, who is entitled to claim the exemption, either as heir or distributee, or as claimant under the statute. In such a contest the exemption is absolute in favor of the heir or distributee, if she choose to set up her claim as she does in this instance. Such has been very properly, I think, the construction of this statute in favor of the claim of the widow to the personal estate held by her under it, and the language applicable both to real and personal property is the same as to the absolute character of the exemption, when there are no heirs, distributees or legatees.—*Brooks v. Martin*, 43 Ala. 360. Such property is not charged with the payment of the debts of the deceased, and it can not be sold for that purpose so as to defeat the rights of the claimant under the exemption as the heir, distributee or legatee. This property is absolutely exempt from the burden of the debts of the estate, whether the estate be solvent or insolvent. The law is peremptory and without any uncertainty of meaning. Rev. Code, § 2060, 2061; *clause 6*; *Ib.* § 3539; G., *supra*. The lands of the deceased may be sold for the payment of his debts, but it must be sold subject to this exemption; and in order to protect the purchaser and the administrator in such a sale, very obviously the safer and better practice to pursue is, that when there is an application by an administrator or executor for an order of sale of the lands of the deceased for the payment of his debts, and there is no widow, then the claimants, under the statute, who are minors, should be brought before the court as in chancery, and the court should cause a proper and competent person to be appointed, to defend their interests, and at once appoint persons to lay off and set apart the exempted lands, and order a sale of the residue only. And if the allotment, under the statute, can not be made by metes and bounds, and the order is to sell the whole of the realty

of the deceased, it should show a reservation in favor of the rights of the claimants under the statute, and if the sale was for a less sum than five hundred dollars, it should not be confirmed by the court. This is so, because, if the decedent does not own more than "five hundred dollars worth of land," the claimants, under the statute, are entitled to the whole. This is the statutory measure of their right.—Revised Code, § 2061; *clause 6, supra*; *McCuan v. Turrentine*, January term, 1872. It is a concession by the sovereign power to the widows and the minor children of the State, which it is the duty of the "courts," (which is but another word for the "judges") of the State, to see sedulously protected and enforced. Const. Ala. Art. I, § 15; Pamph. Acts 1870, 1871, p. 4, 5. And in order to guard the rights of the heirs, distributees and legatees of the decedent, as well as those of his widow and infant children, the law authorizes the court to inquire into the question of the insolvency of the estate, on such an application. In this inquiry, any competent evidence which would be "satisfactory to the probate judge" is sufficient. And if such evidence is admissible upon the issue to be proven, it is competent. It need not be "a judicial" ascertainment of the fact. This is not the language of the statute; and it is not necessary for the protection of the interests of the parties concerned, that it should receive such a limitation. Courts can not add such limitations, unless they necessarily grow out of the application and purpose of the law. It would be an introduction of words into the statute which are not found there, and are not required for its fair construction and its beneficial operation. It would be legislation, which is forbidden to the courts.—*License Tax Cases*, 5 Wall. 462, Chase, C. J., *arguendo*, p. 469; Const. Ala. Art. III. Insolvency simply means that the property of the deceased, at the market price, is insufficient to pay his debts.—2 Black. Com. 285, 471; Webster's Dict., Unabr., word *Insolvency*. Any facts that show the amount of the decedent's debts, and the quantity and value of his property charged with the pay-

Reynolds v. Dismuke, Adm'r.

ment of his debts, are admissible and competent. These facts the administrator is presumed to know. He is a competent witness. The court, then, erred in rejecting his testimony, and also in dismissing the appellant's petition, for the reason shown in the record; which, as no other reason appears, will be taken for the true reason. For the record, if not otherwise in some legal manner discredited, is presumed to speak the truth.

The right of the petitioner in this case is beyond all dispute. She is a minor of very tender years, a girl and an orphan. And the right, whether it is exerted under the statute in her favor as a member of the family, or as heir or distributee of her father's estate, vests the exemption wholly in her. In such a case, the court of probate, following the analogies of the court of chancery, should not dismiss her petition for any informality which would be amendable. Such a practice is to be looked upon with very grave disfavor. The court should have directed the petition to be properly amended, if it was deemed insufficient.—*Childress v. Harrison, Ex'r*, January term, 1872; Revised Code, § 2809.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

REYNOLDS vs. DISMUKE, ADM'R.

[ACTION AGAINST BIDDER TO RECOVER DIFFERENCE BETWEEN AMOUNT BID FOR PROPERTY AND THAT REALIZED ON RESALE.]

1. *Amended complaint; objection to filing of, when properly overruled.*—An objection to a motion for leave to file an amended count to the complaint, that states no reason for the objection, may be overruled without error.
2. *Act; intention with which done, how proved.*—The intention with which an act is done, must be shown by what is said or done at the time, not by proving an intention not then expressed.

Reynolds v. Dismuke, Adm'r.

3. *Release of purchaser from bid by administrator; what proof as to immaterial.*
If an administrator, at a public sale of the personal property of the estate, agrees to release a purchaser from his bid, it is immaterial, as far as the purchaser is concerned, whether he intended, thereby, to take the property as his own, or to hold it as the property of the estate. In either case, he can not afterwards repudiate his agreement, and resell the property for a less sum and charge the purchaser with the difference.

APPEAL from the Circuit Court of Bullock.

Tried before Hon. J. McCaleb Wiley.

The appellee, plaintiff below, as the administrator of the estate of E. M. Brundidge, deceased, in 1868, sued the appellant in a magistrate's court, and was defeated; afterwards, on his petition, the cause was removed into the circuit court by *certiorari*.

In that court the following complaint was filed, to-wit: "The plaintiff, as administrator of E. M. Brundidge, claims of the defendant the sum of forty dollars, due by account, with interest thereon from December 23d, 1867, which said sum of money is due and unpaid, and which, when collected, will be assets in his hands belonging to said estate."

After several continuances, the cause was tried by a jury, on the plea of the general issue, and there was a verdict and judgment for the plaintiff for the sum of fifty 66-100 dollars.

On the trial, a bill of exceptions was signed at the instance of the defendant, the appellant, which discloses, in substance, the following case, to-wit:

The plaintiff, as administrator, &c., as aforesaid, under an order of the probate court, had sold the personal property of said estate at public auction, on a credit, the purchasers to give note and security for the purchase-money. At said sale, a gin and band was struck off to the defendant at the sum of ninety dollars; the plaintiff (alleging that the defendant refused to give his note and security for the ninety dollars,) afterwards advertised and resold the gin and band, at the defendant's risk, having given him notice of the time and place of sale; that at said resale the said property was duly bid off at the sum of fifty dollars; and

that this suit was brought to recover the difference between the two sales.

The defendant, on the other hand, alleged, and introduced evidence tending to show, that after said first sale, on the same day, at his request the plaintiff agreed to take his bid off his hands, and to release him from his purchase and rescind said sale; that the property was, accordingly, left in the plaintiff's possession and was never delivered to him, and that the plaintiff never at any time requested him to give his note and security for the ninety dollars, as the purchaser of said property.

The plaintiff and defendant were both examined as witnesses, as to the alleged rescision of said sale, both admitting they had conversed on the subject, but disagreed as to what was said, the defendant affirming and the plaintiff denying that he agreed to take defendant's bid off his hand and to release him from his purchase, and to rescind the said sale.

In the course of the plaintiff's examination, he was asked by his counsel "if he intended to take the gin and band, if at all, in his individual or in his representative capacity." To this question the defendant objected. His objection was overruled, and he excepted. The plaintiff then stated, "that if he had had any intention to take the gin, his intention was to do so as an individual, and not as an administrator."

This statement the defendant moved to exclude from the jury. The court overruled his motion, and he excepted.

Other witnesses were examined by defendant, whose evidence tended to show that plaintiff agreed to take defendant's bid off his hands, and to release him from his purchase; the whole evidence, however, leaving the matter in doubt. After the evidence was closed, the plaintiff moved the court for leave to file an amended count to his complaint, in which he claimed two hundred dollars, and setting out specially the facts as he alleged them to exist, averring that the said gin and band were bid off by the defendant at the sum of ninety dollars, and that he refused

Reynolds v. Dismuke, Adm'r.

to give his note and security for the purchase-money, and that he afterwards advertised and resold them, at defendant's risk, giving him notice of the time and place of said sale; that at said second sale, they were bid off at the sum of fifty dollars. The defendant objected to plaintiff's said motion. The court overruled said objection, and permitted the amended count to be filed, and defendant excepted.

After the cause was argued, the court charged the jury as follows, to-wit: "That if the plaintiff Dismukes, as administrator, had the right to resell the gin and band, at defendant Reynolds' risk, and charge him with deficit on resale, if any, unless it appeared that Dismukes, as administrator, acting for the estate, undertook, and did release Reynolds from his purchase, in which event the gin and band would have then been the property of the estate, and Reynolds would not be liable in this suit; but if Dismukes intended to take the gin and band as his individual property, and it was so understood between the parties, the act of Dismukes as an individual did not bind him as administrator, and in this event he was entitled to maintain this suit, and to recover of the defendant the difference between the amount bid by defendant for the property at first sale, and the less amount which it sold for at second sale."

To this charge the defendant excepted.

The defendant then asked several charges in writing, all of which were refused. The third charge only need be noticed, and is as follows: "If the jury believe from the evidence that Dismukes agreed to release Reynolds from the purchase of the gin and band, consenting that he (Reynolds) should not give his note with security therefor, and Dismukes kept possession of the gin and band, with the intention of keeping them as his own, then, he can not recover of the defendant in this action, unless the defendant consented to the resale of the property at his risk."

ARRINGTON, and LAW, for appellant.

STONE & CLOPTON, *contra*.

PECK, C. J.—1. There was no error in permitting the

plaintiff to amend his complaint as stated. The objection made, is a mere general objection. No cause is assigned for it. This was, of itself, a sufficient reason for overruling it. If it was intended by said objection to raise the question, that the plaintiff in said count claimed to recover a sum beyond the jurisdiction of the court in which the action was commenced, that was no sufficient reason why it should not be filed, especially as the body of the count shows that the sum claimed does not exceed the jurisdiction of the magistrate's court. In the case of *Cothran v. Weir*, (3 Ala. 24,) it is decided that on an appeal from a justice of the peace, the amount of damages laid in the declaration is matter of form, and can not be looked to to show that the court had no jurisdiction.—See, also, *Hart v. Turk*, 15 Ala. 675. Besides, such an objection, if a good one, should be made by plea, in the nature of a plea to the jurisdiction of the court.—*Bentley et al. v. Wright*, 3 Ala. Rep. 607.

2. The evidence of the plaintiff, that if he had intended to take the gin and band at all, his intention was to take them as an individual and not as administrator, if that was a material question, which we, however, think it was not, was a question to be decided by the jury, from what he said when the conversation was had, not from an intention not then expressed. That evidence was irrelevant, and may, and probably did, mislead the jury, and, therefore, should have been excluded on the defendant's objection.

3. In the latter part of the charge of the court to the jury, the law was misapprehended; the real question was, did the plaintiff agree to take the gin and band, and thereby release the defendant from his bid? If so, it was immaterial, as far as the defendant was concerned, whether he intended to take them as his own, or to hold them as the property of the estate. In either case, he could not afterwards repudiate his agreement and resell the property for a sum less than that bid by the defendant, and charge him with the difference.

4. From what we have said, it follows that the third

Wise, pro ami, v. Norton et al.

charge asked by the defendant was a proper charge, and should have been given.

For the errors mentioned the judgment is reversed, and the cause remanded for another trial at the appellee's cost.

WISE, PRO AMI, vs. NORTON ET AL.

[BILL IN EQUITY TO SET ASIDE GUARDIAN'S SETTLEMENT, &C.]

1. *Married female minor; rights of, as against guardian.*—On the marriage of a minor female ward, she may require her guardian to make final settlement of his guardianship of her estate, and deliver to her the property or moneys belonging to her found to be in his hands on such settlement. Revised Code, § 2422.
2. *Same; settlement in Confederate court, when will not be set aside.*—On her marriage, the husband and guardian may make final settlement of the guardianship of her estate in the probate court of the proper county, and if the settlement thus made is correct, and without fraud or mistake, it will not be set aside in chancery, though the settlement was made in a rebel court of probate.
3. *Voluntary accounting and settlement made in rebel court; when will not be disturbed.*—And after such accounting and settlement in a rebel court, the guardian may pay over to the wife and husband the balance found to be remaining in his hands on such settlement, and take the receipt of the wife and husband for the same, and such receipt will protect him against a second accounting on a bill filed by the wife against him and her husband, in chancery.—Revised Code, §§ 2422, 2685.
4. *Same; what husband and wife may receive, &c.*—And if the husband and wife, after such settlement with the guardian in a rebel court, receive from the guardian a promissory note in payment of the balance due her, instead of money, and the note is collected and used by the wife and husband, she will be held in chancery to have elected to take the note in lieu of money, and will be bound to her election.—*Becton et al. v. Selleck et al.*, June term, 1872.

APPEAL from Chancery Court of Barbour and Henry.
 Heard before Hon. B. B. McCRAW.

The opinion states the case.

Wise, pro ami, v. Norton et al.

SEALS & WOOD, and WATTS & TROY, for appellant.

PUGH & WILLIAMS, *contra*.

PETERS, J.—This is a bill in chancery filed by a married woman against her former guardian and her husband to set aside the guardian's settlement in the rebel court of the county of Barbour in this State, made in 1861, and for a settlement in chancery, and also for the removal of the husband as the wife's trustee of her separate estate. The bill alleges, that the court in which the settlement was made had no authority to make it; that the ward was a minor when it was made, and had no notice of the settlement, as required by law; and that she was not represented in such settlement by any guardian *ad litem* or by herself in person; but that the settlement was conducted by her husband, and that the balance found against the guardian was paid by him in *Confederate treasury-notes* to the husband, and had proved worthless to her. The answer denies that the balance against the guardian was not correctly ascertained by himself and the husband, and that it was paid in *Confederate treasury-notes*. But it insists, and this is shown to be true by the proofs, that the settlement was by a correct accounting before the rebel court between the guardian and the husband, and the balance in the ward's favor was correctly ascertained; and the husband received the guardian's note for this balance, which was made payable to the ward; and this was subsequently paid off in money and another note on one Petty, which was accepted in lieu of money by the husband and wife, and their joint receipt was executed by them and delivered to the guardian, acknowledging the full payment of the balance due the ward on said settlement. This receipt is made a part of the answer, and insisted on by the guardian as a full discharge of his liability. Upon the hearing on the bill, answer and proofs, the chancellor dismissed the bill, and Mrs. Wise brings the cause to this court, and here assigns for error the dismissal of her bill in the court below.

Wise, pro ami, v. Norton et al.

On the marriage of a minor female ward, she becomes entitled to compel her guardian to make a final settlement in her favor.—Rev. Code, 2422. This right is placed upon the same footing as her right to compel a final settlement on attaining her age of twenty-one years. In the latter case, the probate court would order or decree the balance in the hands of the guardian to be paid over to her; and in case he should fail to obey such order or decree, execution should be issued against the guardian and his sureties to enforce it.—Revised Code, § 2450. And as the statute makes no distinction between the two cases, it is taken for granted that a like order or decree should be made on a final settlement, upon the marriage of a minor female ward, as would be made in case of her majority. In the latter case, she could certainly *receive* from the guardian her property, or secure and collect her debt, if the balance should be due her in money, in such manner as she might think fit.—*King v. Seals, Ex'r*, 45 Ala. 415; *Beckton et al. v. Selleck et al.*, June term, 1872. The two cases are not separated in the Code. She could then do the same thing in the event of a settlement upon the marriage. And if not, this certainly could be done by her and her husband jointly. He could do this alone.—Revised Code, § 2375. And her concurrence would not vitiate his act. Upon final settlement, the guardian would be entitled to a discharge, and this could only come from the wife or from the husband, or from both together. These two represent all the powers that can be exercised over the wife's estate. There is no limit on her power to collect her debts, and to *receive* her estate, with her husband's concurrence. In this her power is absolute, as soon as her disability of minority is removed; and this is removed by her marriage. The authority then being absolute in herself and her husband, with his concurrence, she may exercise it as she may think best. And her guardian can only be held responsible to her for injuries occasioned by frauds and mistakes in the settlement between them. Where the law bestows a power, all the incidents necessary for its exercise are given with

it, unless it is otherwise limited. This is so with mere agencies, which are much more restricted in this respect than where there is an exercise of powers pertaining to the absolute dominion over the thing to be accomplished. Story on Ag. chap. 6, § 57, *et ubique*; *Sexton v. Wheaton*, 8 Wheat. 229, Marshall, C. J., *arguendo*. The wife, then, being made able to collect her debts and to receive her own estate, must be left free to do it in her own way.—Revised Code, §§ 2370, 2388, 2382, 2552; *King v. Seals*, 45 Ala. 415. There is no charity in the law that can help her in this, if she has made a bad bargain for herself, unless she can show that there has been fraud or mistake, by which she has been injured. In the exercise of her powers to reduce her property to her possession, to collect her debts, or to pay the debts that may be due from her to others, she does not exercise the powers of a *feme sole*. She merely exercises the rights of a *married woman*, with a separate estate, under the law of the Code, and no more. She is not restored to the rights of a *feme sole* until after the husband is deprived of any control over her estate by decree of the court of chancery, upon proceeding for that purpose. After such decree, *thenceforward*, she shall have “the same control over her estate, and the rents, issues and profits thereof, as if she were a *feme sole*, and may sue and be sued in her own name; but the husband is not liable for her acts or contracts.”—Rev. Code, § 2384. There is no proof that the wife in this case was in any way imposed upon by the guardian, or that there was any mistake or fraud in the final settlement or in the manner of the discharge of his liability to her; she must then be held to abide by the election she has made. She was not bound to make her settlement in the rebel court, and after having made it there, she was not bound to receive the guardian’s note in lieu of money in payment for the balance; but as she did so, and acted without constraint either of her guardian or her husband, I feel reluctantly bound to say that a court of chancery can not relieve her from the misfortune of an unwise transaction.—*Judge v. Wilkins*, 19 Ala. 765.

Heller v. Mayor, Aldermen, &c., of Mobile.

There was no sufficient proof that the guardian paid what he owed his ward in *Confederate treasury-notes*, or in any other *worthless thing*. If there had been such proof, I should have been strongly inclined to treat *such a payment as a fraud*. It is not beyond strong grounds of presumption, that the circulation of *such a currency* was a *fraud* upon the whole community, that was forced, by necessity or fear, to accept and treat it as money. To say that married women and minors were free to reject it, when tendered in payment of debts, is more than can be said for their husbands, fathers and brothers, who were of mature age, within the range of the fury of the late rebellion, at least in some localities. The evidence in the court below failed to sustain the material allegations of the bill. The learned chancellor did not, therefore, err in his decree.—*Phillips v. Phillips*, 39 Ala. 63.

The judgment of the court below is affirmed, with costs.

HELLER vs. MAYOR, ALDERMEN, &c., OF MOBILE.

[APPEAL FROM JUDGMENT OF CONVICTION IN CITY COURT OF MOBILE ON APPEAL FOR VIOLATING AN ORDINANCE OF THE CITY OF MOBILE.]

1. *Ordinance No. 50 of the city of Mobile, construed*.—Under ordinance No. 50 of the city of Mobile, a green grocer, doing business in said city, has no right to use his own cart to deliver meat to his customers within the city limits, without first obtaining a license for the same from the corporate authorities. The fact that no charge is made for the delivery, does not alter the case.

APPEAL from the Circuit Court of Mobile.
Tried before Hon. JOHN ELLIOTT.

The opinion states the case.

Heller v. Mayor, Aldermen, &c., of Mobile.

ALEXANDER MCKINSTRY, for appellant.

R. & O. J. SEMMES, *contra*.

PETERS, J.—The appellant, Heller, was prosecuted in the mayor's court of the city of Mobile for a violation of ordinance numbered 50 of the by-laws of the corporate authorities of that city, and convicted and fined twenty-five dollars. From this judgment he appealed to the circuit court of Mobile, where there was a new trial on the same issue, and he was again convicted, and judgment for twenty-five dollars and costs was rendered against him. From this latter judgment he brings his case to this court by appeal, and here assigns the judgment of the circuit court for error.

A person who makes his residence in an incorporated city consents to be bound by its laws, so far as they are legal enactments. The act of the general assembly of this State incorporating the city of Mobile, among other things, clothes the corporation with "full power and authority" "for regulating hackney-coaches, carriages, wagons, carts, drays, and for licensing the same."—Pamph. Acts 1865-66, p. 212, § 30. And also "to pass all such resolutions, by-laws and ordinances" as the city authorities "may deem requisite and necessary for the good government of the said city, not contrary to the laws of the State of Alabama." *Ib.* p. 214. Under the power thus given the city government passed an ordinance in the following language, to-wit:

"*Be it ordained*, That the owner of each and every dray, cart or wagon, kept for hire or employed in hauling, or *used for any purpose* within the limits of the city, shall obtain a license to run such dray, cart or wagon, to be issued by the mayor under the seal of the corporation and countersigned by the clerk, and shall give such bond and pay such sum for said license *per annum* as the corporate authorities may from time to time determine. This ordinance shall not extend or apply to wagons and carts employed in hauling for the owner the products of his farm, and wagons and carts used for private family use, where no money is

Garlick v. Dorsey.

received, nor to carts employed solely in the service of the city."—City Ordinances, § 50.

The proof shows that the appellant was a "green grocer" in the city of Mobile, and that he used a cart in his business as such grocer to haul his meat from his slaughterhouse, (which is not shown to be beyond the city limits on his farm,) and to deliver his meat to his customers in the city. It also appears that no charge was made for the cartage thus rendered. Very clearly the cart thus used comes within the precise words of the ordinance above quoted, and it can not escape under either of the exceptions. It was a cart used and employed in hauling within the city limits for a purpose not exempted from license, and the appellant had obtained no license to use it within the city. This was a violation of the ordinance. It is equally certain that the city corporation had the authority to pass and enforce such an ordinance.

The judgment of the court below is therefore affirmed.

GARLICK *vs.* DORSEY.

[ACTION TO RECOVER DAMAGES FOR KILLING MULE.]

1. *Property, use of; subject to what limitations.*—Every owner of property, in this State, holds and enjoys it under the limitations, that it must be so used as not to injure the person or property of any other person, if such injury can be reasonably prevented.
2. *Action to recover damages for mule killed by runaway horse; what must be proved to entitle plaintiff to verdict.*—In an action for the value of a mule, killed by the shaft of a wagon of defendant, with which the horse was running away, it must be shown that the owner of such horse and wagon was negligent in permitting the horse to escape and run off with the wagon. In such case the question of negligence must be left to the jury.

APPEAL from the Circuit Court of Lee.

Tried before Hon. LITTLEBERRY STRANGE.

The appellant, Garlick, sued the appellee, Dorsey, for negligently causing the death of appellant's mule, worth three hundred dollars.

The facts stated in the bill of exceptions are as follows : The plaintiff's mule, worth one hundred and seventy-five dollars, was standing at a "hitch-post," on a vacant lot in the town of Salem, in Lee county, in this State, which hitch-post was away from any street or public highway in said town. On the same day the defendant drove his horse, hitched to his cart, into said town, (while said mule was so hitched,) and came to a shop in another part of said town, where he stopped and got out of his wagon, leaving his horse unattended and harnessed to his wagon, and went to said shop and engaged in conversation there for some three or four minutes. While so engaged, his horse ran away with the wagon and ran against plaintiff's mule, and so wounded the mule with the shaft of the wagon that the mule died, and was thereby lost to the plaintiff. The defendant showed that his horse was about eleven years old, had the reputation of being gentle and kind, and had borne that character for eight years. There was no evidence of careless or negligent driving of said horse by said defendant. It was also shown that said horse had never scared or run away before, and that defendant was in the habit of leaving him standing a few minutes at a time, and he had always stood quiet and gentle. Upon this evidence the court charged the jury, "that unless the evidence showed that defendant previously had notice of the animal's mischievous propensity, the plaintiff could not recover." The plaintiff excepted to this charge, and on his behalf moved the court to charge the jury, "that if they believed, from the evidence, that the injury to plaintiff's mule was attributable to neglect on the part of the defendant, then the plaintiff was entitled to recover." This charge was refused, and the plaintiff again excepted. Upon this the jury found a verdict for the defendant, and judgment was entered accordingly against the plaintiff for cost. From this judgment the plaintiff appeals to this court and here

Garlick v. Dorsey.

insists that the charge given and the refusal to charge as asked were errors to his injury.

STONE & CLOPTON, for appellant.

W. H. BARNES, *contra*.

PETERS, J.—The charge of the court below, which was asked by the plaintiff and refused, embodies the principle of law, upon which cases of this character are determined. *Sic utere tuo, ut alienum non lædas*, is the limitation under which every person must use his own property.—1 Bla. Com. 306; Broom's Max. 15 Johns. 218; 17 Mass. 334; 4 McCord, 472; 9 Coke, 59; *Stumps v. Kelley*, 22 Ill. 140, 142. One person has no right to make such use of his property as to inflict injury on the person or property of another. In *Earl v. Van Alstine*, (8 Barb. 630, 634,) after a careful examination of the decided cases, Mr. Justice Selden says: "These authorities seem to me to point to the following conclusions: 1. That one, who owns or keeps an animal of any kind, becomes liable for any injury the animal may do, only on the ground of some actual or presumed negligence on his part. 2. That it is essential to the proof of negligence, and sufficient evidence thereof, that the owner be shown to have had notice of the propensity of the animal to do mischief. 3. That proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice." These propositions simply show that there must be proof of negligence. If the animal doing the injury is *feræ naturæ*, that is, wild by nature, the owner is bound to keep it safely or not at all. If it occasions injury, the owner is bound to make a proper compensation in damages, if the person injured is not himself in fault.—*May v. Burdett*, 9 Q. B. 101. But if, on the other hand, the animal is *mansuetæ naturæ*, rendered tame by training and culture, then the rule of evidence is relaxed, and negligence must be shown. It is not to be inferred from the nature of the animal. There must be proof that the animal was vicious and the owner knew its vicious habits. He would then become responsible if he failed

properly to provide against them.—*Kittredge v. Elliott*, 16 N. Hamp. 77. But in whatever form it may be presented the question of liability turns upon the fact of negligence or the absence of it.—Sherm. & Redf. on Negligence, p. 226, § 185, *et seq.*, 2d ed. Negligence has been defined to be “the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.” *Blyth v. The Birmingham Water Works Co.*, 11 Exch. R. 784, *per Alderson*, B. The first charge was abstract. There was no proof of any mischievous propensity.

The charge asked and refused should have been given. This was error.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

EX PARTE WARE.

[APPLICATION FOR MANDAMUS.]

1. *Action against partner; how may be revived.*—An action may be brought against one member of a partnership firm, on a contract made by the firm. In such an action, on the death of the defendant, the same survives against the personal representative of the deceased, and may be revived in the name of such representative as defendant.
2. *Mandamus; when will lie to compel court to make order of revival.*—If the court, on plaintiff's motion, refuses to make the proper order to revive such action, in the name of the personal representative of the deceased defendant, after a *sicere facias* has been duly served on him, for that purpose, a mandamus will be issued to require the court to make such order.

This is an application for mandamus. The petitioner, at the spring term of the circuit court of Russell county, 1866, commenced an action of assumpsit against Benjamin Fontaine, to recover the sum of five hundred dollars, for

money had and received by said Fontaine, and one William Hughes, as partners under the name and style of Fontaine & Hughes.

The summons was served on the defendant, said Fontaine, and he appeared and pleaded payment. Afterwards, at the fall term of said court, 1870, the death of defendant was suggested, and an order made by the court to revive the suit against the personal representatives of said deceased, when known, and that a *scire facias* issue, &c. A *scire facias* was, accordingly, issued on the 29th day of May, 1871, and was served on James H. Shorter, the administrator of deceased, to appear at the next term of said court, and to show cause why said cause should not be revived, and he, as administrator, &c., made a party defendant, in the place and stead of said deceased. At the fall term, 1871, Shorter, the administrator, appeared, and the petitioner moved the court to make said Shorter, as administrator, &c., a party defendant, and that the suit be revived in his name, &c.

Shorter objected, on the ground that the action was founded on a contract made by deceased and said Hughes, as partners; that said Hughes was alive, and that the claim was against the partnership, and not against the deceased as an individual, &c.

The court sustained the said objection, overruled the petitioner's motion, and refused to make said Shorter, as administrator of said deceased, a party defendant, and ruled that said action could not be revived in the name of the personal representative of deceased.

The petitioner prays for a writ of mandamus, to the judge of said circuit court, requiring him to make an order reviving said action against said Shorter, as the administrator of said deceased, &c., or that he show cause why he refuses to do so.

McDONALD, for petitioner.

No appearance, *contra*.

PECK, C. J.—It is very clear that an action may be

brought against one partner, on a contract made by the firm, (§ 2538, Revised Code,) and it is equally clear that on the death of the defendant, in such a case, the action may be revived against his personal representative, (§ 2555, Revised Code.)

Section 2542, Revised Code, declares that "no action abates by the death, or other disability of the plaintiff or defendant, if the cause of action survive or continue; but the same must, on motion, within eighteen months thereafter, be revived in the name of, or against, the legal representative of the deceased, his successor or party in interest." After such revivor, no judgment may be rendered against such legal representative until after eighteen months from the grant of letters testamentary or of administration.—§ 2544, Revised Code.

The circuit court should have granted the petitioner's motion, and ordered the said action to be revived in the name of said Shorter, the administrator of said deceased, as defendant.

The refusal of said court to do this is an injury to said petitioner, for which we know of no adequate remedy but the writ of mandamus. The writ of mandamus lies whenever a party shows a clear legal right, without any other legal remedy for its enforcement.—Shepherd's Dig. p. 693, and the cases there cited.

Let a rule issue, directed to the circuit court of Russell county, to be served on the judge presiding in said court, commanding him, on the motion of the plaintiff in said action, or his attorney, to make an order reviving the same, in the name of the legal representative of said Benjamin Fontaine, deceased, or that he show cause, at the next term of this court, on Thursday, the motion day of the fifth division of this court, why he has not done so.

BECTON ET AL. vs. SELLECK ET AL.

[BILL IN EQUITY TO FORECLOSE MORTGAGE.]

1. *Married woman, owner of separate statutory estate; what power has as to collection of debts due her.*—A married woman, a citizen of this State, who is the owner of a statutory separate estate, is clothed by law with the power to collect her debts, by suit or otherwise, and to “receive,” with the concurrence of her husband, any property to which she may become entitled after her marriage.—Rev. Code, § 2525, 2375, 2372.
2. *Same.*—In the exercise of this power, she acts without restraint, except that which may be imposed by her husband as her trustee. In collecting a debt or sum of money, to which she is entitled, she may take *land* in lieu of *money*. And in dividing the proceeds of a promissory note, in which her interest is one-fourth part, and the note is paid by a transfer of land, and the land is valued at more than her share, if she takes the land, she may pay the balance above her share in money or bind herself by her own and her husband’s promissory note for this balance, and secure the payment of the note thus given by mortgage on the land thus “received” in lieu of her part of the note thus collected; provided the note and mortgage are executed as required by the law governing the “separate estate of wife.”
3. *Same; when mortgage signed by married woman and her husband may be enforced against both.*—Such mortgage may be foreclosed against the wife and her husband if she fails to pay the note when due, which has been thus entered into.

APPEAL from the Chancery Court of Dallas.

Heard before Hon. CHARLES TURNER.

The case is sufficiently set forth in the opinion.

FELLOWS & JOHN, for appellants.

BROOKS, HARRALSON & ROY, *contra*.

[No briefs came into the Reporter’s hands.]

PETERS, J.—This is a suit in chancery, commenced by the appellants, who are minors, against the appellees. There was an original bill and two amended bills, and the purpose of the suit is to foreclose a mortgage, executed by William Selleck and Caroline Selleck, who, at the time of

its execution, were husband and wife, and citizens of this State. The facts set out in the pleadings, so far as they are material, are about these: On the 2d day of February, 1866, Frederick S. Becton, *Senior*, who was the uncle of Mrs. Selleck, and the step-father, or father by adoption, of the appellants, conveyed by deed, of the above date, to James Kent, as trustee, a considerable amount of property, consisting of money, bank certificates of deposit, and promissory notes, which are named in the deed, for the use of said William Selleck, and his wife, Caroline Selleck, and the appellants, the said Benjamin and Frederick Becton, who were then minors. This deed was made in this State. Kent, the trustee, was authorized by it to collect the sums of money thus conveyed, to satisfy the expenses of executing the trust, and to pay the balance as follows: that is to say, *one-fourth* to said William Selleck; *one other fourth* to said Caroline Selleck, his wife, and to hold the *other half* of the money thus conveyed for the use of the appellants, said Benjamin and Frederick Becton, (who were then minors,) until they became of age, and then pay it over to them. Among the claims thus conveyed to Kent, as such trustee, to hold under said deed of trust, was a promissory note, on Joseph J. Alston, for \$15,000, which bore date December 5, 1865, and became due in twelve months after date. Alston was a citizen of New Orleans, in Louisiana, and of somewhat doubtful solvency. He owned a house and lot in the city of Selma, in this State, which he was willing to surrender in payment of his note, at an estimated value of \$12,000, and pay the balance on his note in money. Mrs. Selleck and her husband, said William Selleck, were the owners, as the beneficiaries in the deed to Kent, each of the *one-fourth* part of said note, and they were willing to collect their interests in said debt on Alston, by taking the house and lot in lieu of the money. But the estimated value of the house and lot exceeded their portion of the note on Alston, by a little above the sum of four thousand dollars; and the collection could not be effected in this way, unless they consented to pay to Kent, for the use of the other beneficia-

ries under the deed, the residue of the estimated value of the house and lot, above their shares of the Alston note. This residue was fixed at the sum of \$4,148.33. For this sum Selleck and wife executed their note to Kent, as trustee as aforesaid, bearing date the 1st day of July, 1866; and on the same day this note of Selleck and wife bears date, they executed a joint mortgage on the house and lot they had thus received in collection of their part of the Alston note for \$15,000. Under this arrangement they received Alston's title to the house and lot, his note was given up to him, and the Alston debt was thus collected. When the note of Mrs. Selleck and her husband, secured by the mortgage, fell due, it was not paid. Upon this the Bectons, the appellees in this court and beneficiaries in the deed to Kent, to whom this note belongs, and who were then still minors, bring their bill by their trustee and next friend, against Selleck and wife, said mortgagors, to foreclose the said mortgage. Mrs. Selleck sets up in her defense that she was a married woman, an inhabitant and citizen of this State at the time of making said note for \$4,148.33, and mortgage to secure the same to Kent, and that the property conveyed by her in said mortgage is her statutory separate estate, held under the Code of this State, and that as to her, the note and mortgage are void, and without any binding effect. Selleck, the husband of Mrs. Selleck, made no defense. The learned chancellor in the court below decreed a foreclosure as to Selleck, but refused it as to his wife. The other parties to the suit are merely nominal. From the decree of the chancellor the complainants in the court below appeal to this court, and here insist that the decree of chancellor should have included in the foreclosure, the interest of Mrs. Selleck as well as that of her husband.

There was a demurrer to the bill by Mrs. Selleck in the court below, and I notice it simply to say that the facts contained in the original bill, and the amended bills, pertain to the same subject matter. They are the history of one transaction. They do not constitute two cases. Such amendments are not objectionable on account of a seem-

ing departure in the amendments from the case made in the original bill. The bill was, therefore, properly retained.

Our legislation, to *secure* to married women their own estates, is esteemed a novelty in our system of laws. It runs counter to the practice and the principles of a thousand years, sanctioned by names of the highest authority in a profession where the opinion of such men more or less shape the laws themselves, and control the system of reasoning which belongs to their construction. Then, under the law of our Code, it is not to be expected that cases involving the wife's rights over her estate will run smoothly in the old ruts. The law, whatever may be the judicial prejudice against its policy, is not to be defeated by construction, but should be upheld. It is proper, when we can, to resort to first principles, to give it vitality. The intent of the law is that which should govern in its application to the real affairs of life. What the opinions of distinguished and learned foreign judges and lawyers may be upon questions arising under their own systems, is nothing to us, under ours. One of the glories of this great nation is, that it needs no foreign aid to enable it to do its duty to its own citizens, or to those who come to deal or to reside with us. We are quite as able to be leaders as to be led. It is a happy thing in our country, that no man need to be born with a ring in his nose, or a yoke upon his neck; and as long as we make our own laws, and execute them, with an eye single to the highest interest of our own people, we will not be likely soon to forfeit the birth of all free men—that is, the right to shape their institutions to suit their *own* national growth.

It seems obvious, that, under our statute to *secure* the property of married women to them, for their own separate use, they are clothed with full power to reduce such property to their possession. This may be effected by suit or without suit. This is clearly necessary to a full exercise of such dominion over it, as has been bestowed upon them by the law. The wife may collect her debts, or recover possession of her own property by action at law in her own name.—Rev. Code, § 2525. Then, she may do without suit

what she may do by it, when the purpose is the same. Or, in the language of the Code, she may “receive” her property.—Rev. Code, § 2388. To what extent her husband may interfere with her right, in this respect, as her trustee, need not be discussed in this opinion, as nothing of that kind arises in this case. Here, the husband concurred in all the wife did. And whether she may proceed to collect her debts or to get possession of her property by suit, or “receive” it without suit, she must be allowed the use of the means permitted by law for the accomplishment of such an end. She is not bound to sue, when by some other arrangement she may much more certainly promote her interests. Of this, if there is no fraud or deceitful dealings, she and her husband must be left to judge for themselves. She may then submit to arbitration, or compromise a doubtful claim, and bind herself by a proper contract to the result. In collecting her debts, she may receive money, or, in lieu of money, some specific property that suits her as well. If she sues, she may employ an attorney and contract for the payment of his fees. But this power belongs to her as an incident of her right under the Code to collect her own debts, and to reduce her own property to her possession, or to “receive” it. It is a maxim of construction, that if the power is given, and there is no necessary or express limitation, it is given with all the means to make the gift effectual. This principle is universal and axiomatic. It has passed beyond the necessity of a resort to logic for its demonstration. *Quando lex aliquid alicui concedet, concedere videtur id, sine quo, res ipsa esse non potest.*—5 Coke, 47; 3 Kent, 421; Coke 2 Inst. 326; 15 Barb. 153, 160; 8 Mass. 129; Broom’s Max. 203 et seq. (margin. pages.) In such a transaction the wife does not act as a *feme sole* or a *free-dealer*, because she can not do this until the trust is destroyed by a decree of the court of chancery.—Rev. Code, § 2384, 2372. The statute is not designed to make the wife a *feme sole* trader, else sections 2384 and 2372 of the Revised Code would be destitute of meaning. This is also not the legislative understanding of this law. Otherwise, it would not be necessary to make

any woman, who is married, a free-dealer, who has a separate estate, or who might subsequently acquire one. Yet this is a very common practice of the general assembly. *Vide* Index to Acts 1870, 1871, p. 335, 336, and the cases there referred to. And in conformity to this usage and construction, this court has heretofore held, that the Code does not make the wife a *free-dealer*, or a *feme sole* general trader, but, clothes her only with special powers.—*Cheatham v. Wilkinson*, 45 Ala. 337; *Cowles et al. v. Marks*, January term, 1872. Yet, at the same time, it is not intimated that she is limited in any of her rights to collect her debts, or to reduce her property to her possession, or to the possession of her husband, for her use.—Rev. Code, § 2372, 2379; *Glenn v. Glenn*, January term, 1872; *Marsh, adm'r, v. Marsh*, 43 Ala. 677. Here, the transaction was not a loan of money by Kent, the trustee, but an arrangement by Mrs. Selleck and her husband to collect their portions of the Alston note. Such a transaction she could legally enter into, so far, at least, as her own portion of the Alston debt was concerned. As an arrangement to collect her debt, she could “receive” the land, and charge her portion with the payment of her part of the surplus above her interest in the debt—that is, one-half of the note to Kent, executed by her husband and herself, on the 1st day of July, 1866. Beyond this she is not liable on the note to Kent, or the mortgage. The balance, above her own portion of this note, is her husband’s debt. For this she can not make herself liable as his surety or otherwise.—Rev. Code, § 2371; *Cheatham v. Wilkinson*, 45 Ala. 337, *supra*; *Bibb v. Pope*, 43 Ala. 190. Very evidently, both by the note to Kent and the mortgage to secure it, Mrs. Selleck intended to bind herself to the extent of her legal liability, if no more. To this extent, then, she ought to be bound. Such effect must be given to her contracts as the law will enforce her to perform. *Quando res non valet ut ago, valeat quantum valere potest*.—3 Barb. Ch. R. 242. 261; Broom’s Max. 75, 76, *marg.*; *Jackson ex dem. v. Blodget*, 16 Johns. 172, 178, 179. The decree of the court below was correct so far as it went, but it did not go far enough.

Waddill, Ex'r, v. John, Guardian.

Mrs. Selleck, in collecting her portion of the claim against Alston, had had the benefit of one-half of the note to Kent. To this extent, she should have been charged. It should, therefore, have been referred to the register, as master, to ascertain and report this amount, with interest included, up to the date of the report, and there should have been a decree and foreclosure for this amount against Mrs. Selleck. For this error the decree of the court below is reversed, and the cause is remanded, with instructions to proceed in its further disposition in the court below, in conformity with the principles of this opinion.

The costs of this appeal in this court and in the court below, will be paid by the said Caroline Selleck.

WADDILL, EX'R, *vs.* JOHN, GUARDIAN.

[SCIRE FACIAS—JUDGMENT BY DEFAULT.]

1. A citation to the executor of a deceased defendant, with a view to revive the suit against him, as follows: "The State of Alabama, Dallas county. To any sheriff of the State of Alabama. greeting: You are hereby commanded to summon J. Cooper Waddill to be and appear at the next term of this court, to be held on the second Monday in July, 1869," &c. "Witness my hand, this 29th day of March, 1869. E. M. Gantt, clerk," is void for uncertainty as to the court in which the party must appear. The defect is not remedied by the indorsement, "City Court of Selma, July term, 1869;" nor by the date indicated for the return of the process.
2. It is not error to revive the suit against the personal representative on the second day of the term to which the citation is returnable.

APPEAL from the Circuit Court of Dallas.

Tried before Hon. M. J. SAFFOLD.

The opinion states the facts.

J. N. HANEY, for appellant.—The *scire facias* issued in this case is absolutely void. The proceeding was attempted

to be had under section 2544 of the Revised Code; but the *scire facias* is entirely defective, in not showing that the defendant's death had been suggested, and a motion made to revive.—Rev. Code, § 2544.

Suits commenced by *scire facias* are like other actions, and a reasonable certainty in describing the record, which is the foundation of the action, is required.—*Toulmin v. Bennett & Laidlow*, 3 Stew. & Por. R. 220; Revised Code, § 2560.

The *scire facias* was also void, for not informing the appellant as to what court he was required to appear at. He had as much notice to appear before the supreme court, as the city or circuit court. A summons issued without mentioning *any* court *from* which it emanates, is defective and void.—Revised Code, § 2560; *James et al. v. Kirkpatrick*, 5 How. (N. Y.) R. 241.

The summons must apprise the defendant in what court he is required to appear. In this case, the appellant Waddill could not tell whether the summons or *scire facias* would be returned to the mayor's, supreme, city, circuit, or probate court.—*Dix, Agt. Palmer, v. Schoolcraft*, 5 How. (N. Y.) 233; Rev. Code, § 2560.

The summons, or *scire facias*, in this case was so defective and indefinite that the appellant could not have responded to it.—*Ib.*

The *scire facias* in this case, to have been sufficient, should have been issued by the court, "*on motion*" of the appellee, *after* the suggestion of the death of appellant's testator, and should have shown out of what court it issued, and to what court it was returnable, and should have been addressed to the executor as such.—Rev. Code, § 2544; *Heirs of Caller v. Malone et al.*, 1 Stew. & Por. 305; *State v. Allen*, 33 Ala. 422; 21 Ala. 257, 563; *Toulmin v. Bennett et al.*, 3 Stew. & Por. 220; *Dix, Ag't, v. Schoolcraft*, 5 How. (N. Y.) R. 233; *James et al. v. Kirkpatrick*, *ib.* 241.

The order reviving the suit against appellant is also not only irregular, but void, because it does not ascertain the fact of the death of William Waddill, nor the appointment

Waddill, Ex'r, v. John, Guardian.

or qualification of appellant as his representative. These facts, and these alone, must exist, before the court had jurisdiction to make appellant a party, and they should have been judicially ascertained by the court; and the reviving the action against appellant, and taking judgment in the absence of these, is error, and the action of the court thereon void.

J. R. JOHN, *contra*.—The whole case turns on the sufficiency of the citation in this case which issued to J. Cooper Waddill, and which is commonly called a "*sci. fa.*" We confidently insist that the citation is good. This paper was issued (on and after suggesting death of William Waddill and leave to revive) by E. M. Gantt, who was known to be clerk of the city court, commanding the sheriff to summon J. Cooper Waddill to be at the next term of *this court*, to be held on the second Monday of July, 1869, and show cause, &c., why he should not be made a party defendant, as executor of William Waddill, deceased, to a suit now pending in said court wherein James R. John, guardian, &c., is plaintiff, and William H. Eagar and William Waddill, jr., were defendants. The indorsements on this paper were—1st, a statement of the case; 2d, city court of Selma, July term, 1869; 3d, Fellows & Johns, and then the sheriff's entries. This, we insist, is all, and even *more*, than our statute requires.

It is true, that in the body of this citation the court is not designated by its name, but it is so designated on the back. But the citation is issued and signed by the clerk of the city court of Selma. E. M. Gantt was not clerk of any other court, and this is all well known. Waddill is required to appear at the next term of *this* (meaning city court of Selma) court, and this court is still more definitely described thus: "to be held on the second Monday in July, 1869." The terms of the city court were fixed by law, as other courts, and no other court held any term on the second Monday in July, 1869. *The city court did*. There is, therefore, not a shadow of a doubt on the *face* of the citation, legally construed, and without reference to the en-

dorsements, as to the court in which the suit was pending, and in which the executor was summoned to appear and show cause.

Give this citation a proper construction, and justice is done; but otherwise, great injustice will be done. The construction we contend for can injure no one; the construction contended for by the appellant will work irreparable injury in this case, and be of no use in any other. And when the endorsements are looked to, and we think they should be, all ground for exception is clearly removed.

It is proper to consider that this is not strictly a proceeding by "*sci. fa.*" It is not a suit. It is not necessary to set out any cause of action. All that the statute seems to require is to inform the representative of the pending suit, by such a description as will enable him to find the case, and that he shall appear at a certain time, either named or fixed by law, and show cause why he, as the representative of the deceased, should not be made a party to the pending suit in a particular character named as the representative. *No other information* is necessary. This gives all the statute requires, and it is simply foolish and absurd to say that J. Cooper Waddill did not know when and in what court he was to appear, or that he did not know to what suit or in what capacity he was to be made a party. The citation gave him all this, and is good.

The revivor was not premature, or otherwise irregular, but in conformity to the statute.—*Farley, Adm'r, v. Nelson*, 4 Ala. 186; Rev. Code, § 2544.

The motion to set aside the former orders of the court, reviving the suit against J. Cooper Waddill as executor, &c., and to quash the *citation*, or, as it is called, the "*sci. fa.*," was properly overruled and refused for various reasons:

1st. The bill of exceptions shows that *an appearance* had been made. The bill does not state *when* Waddill appeared, but it should be most strongly construed against Waddill, and it is clear, that it was *before* the motion was made; and we say it was *long before the motion was made*.

Waddill, Ex'r, v. John, Guardian.

He appeared, it is said, for the purpose of making the motion. How did he find out the court? When did he appear? If he appeared to make the motion, why did he not make it until after the lapse of eighteen months? Why did he not show when he first found out the citation? Why did he not ask leave to plead a substantial cause against reviving on the ground that he had not been duly informed, &c.? Why did he not show some error or wrong in the revivor? The motion was, therefore, too late, and no excuse shown.

2d. The motion does not show any injury, no surprise, no misleading, and he does not show on the hearing of the motion that he did not know in what court or at what time he was required to appear, or that he did not know in what capacity or to what suit he was to be made a party. He does not show that he was ignorant of the order reviving the suit, or that the appearance to make the motion was not in fact made before the order of revivor. All these things he could have shown, if true. He did not, and the presumptions are against him, and the motion was properly overruled for these reasons.

3d. He does not show that he made any inquiry, and was for want of information prevented from pleading, and in that way showing that the case should not be revived against him. He should have pleaded. He did not, and shows no reason why he did not, except that he had nothing to plead. Pleading was his proper remedy; and the motion made is not the proper remedy.

B. F. SAFFOLD, J.—This suit was commenced in 1867, by the appellee, in the city court of Selma, against Eager and William Waddill, on a promissory note made by them in 1859. At the January term, 1869, judgment was rendered against Eager, and the death of Waddill was suggested, and a *scire facias* asked for to his executor, the appellant. The citation was in these words:

“The State of Alabama, } To any sheriff of the State
Dallas county. } of Alabama, greeting: You
are hereby commanded to summon J. Cooper Waddill to

Waddill, Ex'r, v. John, Guardian.

be and appear at the next term of this court, to be held on the second Monday in July, 1869, and show cause, if any he have, why he should not be made a party defendant, as executor of William Waddill, deceased, to a suit now pending in said court, wherein Joseph R. John, guardian, &c., is plaintiff, and William H. Eager and William Waddill, jr., were defendants. And this you shall in no wise omit, and make due return of this writ and the execution thereof.

“Witness my hand, this 29th day of March, 1869.

“E. M. GANTT, Clerk.”

Besides the sheriff's receipt and return, there was indorsed on this process the following: “No. 536. Joseph R. John, guardian, vs. William H. Eager and William Waddill, jr. City court of Selma, July term, 1869.” At the July term, 1869, the cause was revived against the appellant.

At the fall term, 1870, of the circuit court of Dallas county, the cause having been removed to that court under an act of the legislature abolishing the city court, a motion was made as follows: “The defendant, J. Cooper Waddill, moves the court to set aside and vacate the former order of court reviving this suit against him as executor, and to quash the *scire facias* heretofore issued on which said order of revival was made, on the following grounds,” &c. Signed “Jasper N. Haney, *amicus curiæ*, for motion.”

Prior to this time, there had been no appearance of this defendant, or of his testator, and none was then entered, except as above stated. The court overruled the motion, and a judgment by default was rendered against the defendant as executor.

The manner of obtaining jurisdiction of the personal representative of a deceased defendant is to cite him to appear at the next term of the court and defend.—Revised Code, § 2544. This citation, called a *scire facias* prior to the Code, and commonly so called since, is perhaps not technically such. It must, however, be considered as a mesne process to be issued from the court, and to contain the essential qualities of a writ to be served on the party,

Waddill, Ex'r, v. John, Guardian.

thereby summoning him to appear in court to hear the complaint against him. These essential qualities are, that it must be signed and tested by the clerk, and directed to the sheriff. It must describe the court properly, have proper parties, and contain a proper cause of action.—3 Chit. Gen. Prac. 163; *Nabors v. Nabors*, 2 Por. 162; Revised Code, §§ 2559, 2560. When, as in this case, the citation is merely a continuation of a pending suit, and its only purpose is to bring the party into court, where he will find the declaration, it is sufficient if he is directed to the case which he is required to defend.—*Toulmin v. Bennett*, 3 Stewart & Porter, 220.

Defects which render a writ voidable only, must be pleaded in abatement. But when they are of such a character that the writ will not support a judgment, it is void. Of this latter class is the insufficient description of the court in which the defendant must appear, because what court is authorized to take action against one of whom it has not obtained jurisdiction.

In this case the citation contains a venue. It is signed and tested by one styling himself clerk, simply. It summons the party to "appear at the next term of *this court*, to be held on the second Monday in July, 1869," without any more particular designation of the court. There is an indorsement upon it of the words, "city court of Selma, July term, 1869." If the process was required to be entitled of any court, or if it was an impropriety for these words to be so indorsed after the service upon the party, the defective description of the court in the body of the citation, might be considered an amendable error, or one rendering the writ voidable merely.

It has been held by this court, that the statement in the summons, or writ, of an erroneous time or place of holding the court, did not affect the process, when it could be treated as surplusage.—*Relfe v. Valentine*, 45 Ala. R. 286; *Love v. McRae*, 12 Ala. 444. In *Nabors v. Nabors*, (2 Por. 162,) an error in the time when it was returnable was considered to be available only by plea in abatement, because

the statute (Aik. Dig. 278) so directed. When a proper venue is stated, and the court designated, a defendant can not be prejudiced without fault on his part, inasmuch as he is presumed to know the time and place of holding the court.

In *The State v. Allen*, (53 Ala. 422,) an undertaking of bail was held to be void for uncertainty, because it required the accused to appear before the said justice, "or some other justice of the peace," without naming a place. The court remarked, in argument, that a bond requiring the party to appear at some named circuit court, or some other circuit court, would undoubtedly be void for uncertainty.

It is insisted, that as the appellant was bound to know when the terms of the city court of Selma were to be held, and the time specified in the citation for its return corresponded with the commencement of a term of that court, the venue being right, he was sufficiently informed of the court in which he was to appear. The probate court holds a regular term on the second Monday of each month, and the clerk which its judge is authorized to employ has power to do all acts not judicial in their character.—Rev. Code, 792, 796, § 5.

I have not found any authority tending to show that the people are presumed to know who are the clerks of the various courts. The courts themselves only know judicially their own officers; not those of equal or inferior jurisdiction. On the contrary, there is good reason and much indirect authority why they should not be held to have such knowledge.—*Turner Williams v. The State*, January term, 1872. The court erred in not setting aside the order reviving the suit against the appellant and quashing the citation.

It is not error to revive the suit against the personal representative of the deceased defendant on the second day of the term to which the citation is returnable, if it has been executed. There must be a motion to revive, which is granted by an order of revivor. This can not be made, or will not be operative, until the court has obtained

Taylor, Executrix, v. Perry.

jurisdiction of the representative. When this is done, the right of the plaintiff to the revivor is complete.—Revised Code, §§ 2542, 2544; *Moore v. Easley*, 18 Ala. 619.

The judgment is reversed, and the cause remanded.

TAYLOR, EXECUTRIX, v. PERRY.

[ACTION ON PROMISSORY NOTE AND ON ACCOUNT STATED, &C.]

1. *Revised Code, § 2523; what sufficient averment of interest of plaintiff, within meaning of.*—Where several counts in a complaint, on contracts for the payment of money, whether express or implied, follow each other in succession, and in the last of said counts it is averred “that all right to all of said claims became vested in plaintiff by delivery,” such an averment is, under § 2523 of the Revised Code, a sufficient averment that the plaintiff is the party really interested in said several claims.
2. *Action against executrix; what amendment permissible.*—Where the action is against an executrix, and the complaint is on a note made by her, as executrix, to which a demurrer is filed, because it does not show any cause of action against her, as executrix, the complaint may be amended by adding counts, stating an indebtedness by testator, in his life-time, and striking out the count on the note described in the original complaint.
3. *Interest, payment of by executor on note of testator; when removes bar of statute of limitations and equivalent to presentation.*—Payments of interest by an executor or administrator on a note, made by the testator or intestate, in his life-time, before the bar of the statute of limitations is complete, are partial payments under § 2914, Revised Code, and will remove the bar to the suit, which, without such payments, would be a good defense to the action. Such payments are, also, an admission, on the part of the executor or administrator, that the claim had been duly presented.
4. *Promissory note given by executor, for debt of testator; effect of.*—A promissory note given by an executor or administrator, for a debt of the testator or intestate, is neither a payment nor an extinguishment of such debt. At most, it only suspends the right of action on the original debt, until the maturity of such note. The transfer of such a note by delivery, operates to pass to the holder the real interest in the original debt, and, under § 2523, Revised Code, authorizes and requires him to sue for its recovery in his own name.
5. *Payments of interest on new note; effect of, on original debt.*—Payments of

Taylor, Executrix, v. Perry.

interest on such a note, are, in legal effect, partial payments upon the original debt, and preserve it from the influence of the statute of limitations.

APPEAL from the Circuit Court of Montgomery.

Tried before Hon. JAS. Q. SMITH.

The action in this case was commenced by the appellee against the appellant, as the executrix of Jesse P. Taylor, deceased. The original complaint was on a note for \$2,421 62-100, made by her, as executrix, &c., as aforesaid, on the 16th day of March, 1858, payable to W. B. S. Gilmer twelve months after date, with interest from date.

To this complaint a demurrer was filed by defendant; afterwards, but before said demurrer was disposed of, the complaint was amended by adding new counts and striking out the original complaint.

The amended complaint consists of five counts, numbered from two to six, inclusive. Count number two is the common count for \$2,421 62-100, due from said deceased, in his life-time, to said Gilmer, for money loaned by him to said deceased. The third is for a like sum, on an account stated between the defendant, as executrix, &c., and said Gilmer, on the 16th day of March, 1858. The fourth states that deceased, in his life-time, was indebted to said Gilmer, in the sum of \$2,421 64-100 for money loaned, and on the 16th day of March, 1858, an account was stated between said Gilmer and defendant, as executrix, &c., as aforesaid, and it was then ascertained and agreed that the said sum was the true proper claim of said Gilmer against defendant, executrix, &c., and in consideration thereof defendant, as executrix, &c., promised to pay it, and avers that all right to all of said claims became vested in plaintiff by delivery. The fifth is on a note made by deceased and Wm. Taylor to said Gilmer, on the 23d day of January, 1847, and payable on the first day of January, 1848, and avers that said note had been transferred by delivery of said note, and the interest therein was claimed by plaintiff.

Taylor, Executrix, v. Perry.

The sixth is a special count, which states that on the 23d day of January, 1847, Jesse P. Taylor was indebted to said Gilmer in the sum of \$2,421 64-100, and being so indebted, the said Jesse P. Taylor and Wm. Taylor, on said day, made to said Gilmer their promissory note for that sum, due the first day of January, 1848. That afterwards, said Jesse P. Taylor departed this life, and the defendant became his executrix; and the said note not being paid, said defendant, as executrix, Mary A. Taylor, Rosannah C. Taylor, Rosa J. Taylor and Wm. Taylor, on the 15th day of January, 1858, made their note to said Gilmer for \$2,421 62-100, payable twelve months after date, with interest from date; that the sole consideration of said last named note was the said sum of \$2,421 62-100, due and owing by the estate of Jesse P. Taylor to said Gilmer on the 23d day of January, 1847, and for which the note of that date was given, and that said debt had never been paid, and avers that the indebtedness due by the estate of Jesse P. Taylor had been transferred to plaintiff by delivery; that he claimed the said sum of \$2,421 62-100, with interest thereon.

The second, third and fourth counts follow each other consecutively, and the fourth count avers that all right to said claims became vested in the plaintiff by delivery.

To all these counts, except the fifth, demurrers were filed, and several causes of demurrer are assigned, varying in words, but in reality meaning the same thing, to-wit: that said counts do not show that plaintiff was the party really interested in the claim named in said counts respectively.

The sixth count avers that the indebtedness due by the estate of Jesse P. Taylor had been transferred to plaintiff by delivery, and he claimed the said sum of \$2,421 62-100, with interest thereon.

The demurrers being overruled, the defendant pleaded two special pleas, both verified by affidavit—the first, that the amount of \$2,421 62-100, alleged to have been due from the deceased, in his life-time, to the said Gilmer, and upon which the suit was founded, had never been transferred to the plaintiff.

Taylor, Executrix, v. Perry.

2d. That the note described in the fifth count had not been transferred to the plaintiff. To these were added six other pleas: 1st. The statute of non-claim; 2d and 3d. The statute of limitations of three and six years; 5th. Accord and satisfaction; and 6th. The general issue, with leave to give in evidence any matter as if specially pleaded.

On all of these pleas the plaintiff took issue, except the third, to which he replied a subsequent promise. All, in short, by consent.

After this the parties went to trial on an agreed statement of facts, which may be stated as follows: It was admitted that deceased, Jesse P. Taylor, in his life-time, borrowed of said Gilmer the sum of \$2,421 62-100, and gave his note, with Wm. Taylor, for the same, on the 23d of January, 1847; that after this, in December, 1851, said Jesse P. Taylor died; that in the same month his executors took out letters testamentary, and in September, 1852, defendant qualified as executrix, and afterwards became sole executrix. Afterwards, on the 11th of March, 1853, the defendant, as executrix, paid the interest on said note, and continued to pay the interest thereon annually, until the 16th of March, 1858, on which day said Mary A. Taylor, as executrix, &c., Mary A. Taylor, Rosannah C. Taylor, Rosa Taylor and Wm. Taylor gave their note for \$2,421 62-100 to said Gilmer, payable twelve months after date, with interest from date, for the said note of Jesse P. and Wm. Taylor, made on the 23d of January, 1847, for the money borrowed as aforesaid; that upon the receipt of said note, so made by Mary A. Taylor, Rosannah C. Taylor, Rosa Taylor and Wm. Taylor, the said Gilmer surrendered to said Mary A. Taylor, as executrix, the note given to him by Jesse P. and Wm. Taylor; that said executrix, Mary A. Taylor, defendant, paid the interest on said note so made by her as executrix, and the other parties named, until March the 16th, 1864; that subsequently, said note was transferred to plaintiff, who, on the 16th day of June, 1868, brought suit on the said note, and at the same time, and to the same court, brought suit on said note against

Taylor, Executrix, v. Perry.

said Mary A. Taylor, Rosannah C. Taylor and Wm. Taylor; that at the January term of said court, 1870, the complaint in this case was amended by adding special counts on the original consideration of said note, made by Jesse P. and Wm. Taylor, on the 23d of January, 1847, and striking out of the complaint the count on the note, made by said Mary A. Taylor, executrix, Rosannah C. Taylor, Rosa Taylor and Wm. Taylor, constituting the original complaint, and the cause was continued. At the same term judgment was recovered by the plaintiff against Mary A. Taylor and Wm. Taylor on said note, made in 1858; that execution had been issued on said judgment, and that said note, made in 1858, was offered and read in evidence. This was all the testimony. On these facts, the court charged the jury that if they believed all the evidence, they must find for the plaintiff. To this charge the defendant excepted, and her bill of exceptions was duly signed and sealed, &c. The jury found for the plaintiff, and judgment was rendered accordingly.

The defendant appealed. The assignments of error, although nine in number, really consist of three only, to-wit: 1. Permitting the original complaint to be amended; 2. Overruling the several demurrers of the defendant to the 2d, 3d, 4th and 6th counts of the complaint; and 3d. The charge of the court to the jury.

JNO. W. A. SANFORD, and ELMORE & GUNTER, for appellant.

MARTIN & SAYRE, *contra*.

[No briefs came into the Reporter's hands.]

PECK, C. J.—1. Section 2809 of the Revised Code, and the construction it has heretofore received in this court, fully justified the amendment of the original complaint in this case.—*Crim's adm'r v. Crawford*, 29 Ala. 623; *Zeigler & Hall v. David*, 23 Ala. 127; *Jemison v. P. & M. Bank*, 23 Ala. 168; *Gayle v. Bancroft's adm'r*, 22 Ala. 316.

2. Demurrers were filed to all the counts except the

fifth, the ground being that the counts did not show that the plaintiff was the party really interested in the claim sued on in the several counts respectively.

It must be admitted that these counts are not framed as skillfully and artistically as they might be, nor has the pleader used the most appropriate language to express his meaning.

Section 2523, Revised Code, declares that every action founded upon a promissory note, bond or other contract, *express or implied*, for the payment of money, must be prosecuted in the name of the party really interested, whether he have the legal title or not. If the averments in these counts do not mean that the claims, described therein, belong to the plaintiff, that he is the party really interested in them, it is very certain they do not mean any thing else, and are then insensible, without meaning and void; but we are not prepared to say this. Although greatly wanting in perspicuity and precision, we think, reasonably interpreted, they mean that these claims belonged to the plaintiff; that he is, in the language of the Revised Code, "the party really interested." So interpreted, the said demurrers were correctly overruled.

The certainty required in declarations and pleas is, that the facts which constitute the cause of action, or ground of defense, are to be so stated that they may be understood by the party who is to answer them, by the jury who is to ascertain the truth of the allegations, and by the court which is to give the judgment.—1 Ch. Pl. 233. It seems to us this is done in these counts, and that the language of said averments was not misunderstood by the defendant. Mr. Chitty says, there are cases where the courts have overruled a demurrer, yet they have directed the plaintiff to amend so that no deviation from the usual form shall appear to have been sanctioned.—1 Ch. Pl. 233, *supra*. The Revised Code requires no particular form of words to be used, therefore, any words may be used that show that the plaintiff is the party really interested in the claim, the foundation of the action.

3. All that remains is to determine whether the charge of the court is or is not correct. After a careful examination of the facts agreed upon, and their application to the issues made up by the parties, I am satisfied the said charge is free from error.

The debt described in all the counts of the amended complaint, and sought to be recovered of the defendant, as the executrix of Jesse P. Taylor, deceased, originated in a loan of \$2,421 62-100, made by said Gilmer to said deceased, on the 23d of January, 1847, for which debt the deceased, with Wm. Taylor, made his note, payable to said Gilmer. On this note, after the death of said Jesse P. Taylor, in 1851, to-wit: on the 11th day of March, 1853, the defendant, as executrix, &c., paid the interest, and continued to pay the interest annually on the same until the 16th of March, 1858.

It may properly be said here, that this debt was not barred by the statute of limitations when the interest was first paid, deducting the six months, when no suit must be commenced against an executor or administrator as such. § 2276, Revised Code. Furthermore, the payments of the interest, by the defendant, were partial payments, before the bar of the statute was complete. This was evidence of a continuing contract by the party sought to be charged, (§ 2914, Revised Code,) and was, also, an admission on the part of defendant, as executrix, that the debt had been duly presented. As to the plea of the statute of three years, it was not applicable to this debt, because it was not an open and unliquidated account.

On the 16th day of March, 1858, the defendant, as executrix, &c., with the other persons named, made her note for \$2,421 62-100, to the said Gilmer, payable twelve months after date, with interest from date, for the said note of Jesse P. and Wm. Taylor, made on the 23d of January, 1847, and upon the receipt of this note the said note of Jesse P. and Wm. Taylor was surrendered to said Mary A. Taylor, executrix, &c., as aforesaid, and on said last note, the note made in 1858, said executrix paid the inter-

est annually, until the 16th day of March, 1864. Said last note was neither payment nor an extinguishment of the said debt secured by the said note of Jesse P. and Wm. Taylor.—*Mooring et al. v. Mobile Dock and Marine Insurance Co.*, 27 Ala. 254; Parsons on Notes and Bills, 2 vol. 153, 155. It suspended the right of action on the original debt until the maturity of said note, (2 Parsons on Notes and Bills, *supra*.) and was evidence of an account stated between the creditor and the executrix. On a count, averring an account stated between the creditor and defendant, as administrator or executor, and that in consideration thereof the defendant, as executor or administrator, promised to pay, &c., does not charge him personally. 2 Williams on Executors, 1507; 4 Am. from last London edition. The payments of the interest on said last named note, the note of 1858, were, in legal effect, partial payments upon the original debt, thus preserving the original debt from the influence of the statute of limitations, to the 16th of March, 1864, when the interest was paid for the last time; from that time to the commencement of this suit but little more than four years transpired. This disposes of the defenses of the statute of limitations and non-claim.

The said note, made the 16th of March, 1858, was transferred to the plaintiff, and was a part of the evidence in the case. This transfer, we hold, operated to constitute the plaintiff the party really interested in the said debt, for the payment of which it was made, and authorized and required him to sue in his own name.—§ 2522, Revised Code. The judgment recovered on said note, against Mary A. Taylor and Wm. Taylor, and execution issued thereon, without satisfaction, was no extinguishment of the original debt of said Gilmer on Jesse P. and Wm. Taylor, (2 Parsons on Notes and Bills, 155,) and, consequently, no defense to this action.

On the facts agreed upon between the parties, it seems to us the plaintiff was entitled to recover, therefore the court below committed no error in so charging the jury.

Taylor, Executrix, v. Perry.

The judgment is affirmed, and the appellant will pay the costs.

NOTE BY THE REPORTER.—At a subsequent day of the term, appellant's counsel applied for a rehearing, and filed in support thereof the following argument:

Although the statutes of amendment in force are of the most liberal character, they still have limits. For instance, entirely new parties can not be made.—*Leaird v. Moore*, 27 Ala. 326. Nor can a party be sued in a special character, and a judgment be entered against such party generally.—*Bob Taylor v. Taylor*, 43 Ala. 649. Nor can the nature of the action be changed, or an altogether different cause of action be substituted for that upon which the suit is brought.—*Harris v. Hillman*, 26 Ala. 380 ; *Crim v. Crawford*, 29 Ala. 726. Certainly, a note made by four persons in 1858, is a very different note from one made in 1847 by two persons, and only one of the latter being a maker jointly with the makers of the former. Not only so, but the very consideration of the latter note was substituted for the note first sued upon. If the action had been commenced on a bond, could this instrument be stricken out, and a note substituted for it? Certainly not. Yet the substitution of notes, as the consideration of notes made by other persons than those originally sued, is no less a change.

When a debtor gives a promissory note for payment of his indebtedness, the creditor, at the maturity and non-payment of the note, may sue on the account. But in this case the debt is contracted, and the note is given by the same party. Nor, in such a case, will an unsatisfied judgment be a discharge from the debt. But in the case at bar this principle does not apply. The note for which the substituted note was given, was extinguished by the fact that new parties were accepted in lieu of the old. A vendor of land has a lien, but if he takes personal security for the purchase money, it is lost. This is on the ground that he no longer looks to the land for the payment of his debt, and that the waiver of his lien is the consideration of the

note on which a maker is bound who receives no benefit. Why should not the same rule apply when new parties are taken as sureties and makers of a note, in the place of the one made by the original debtor? It is an agreement that if certain named persons will join in a note, the one already existing, as the note of the debtor, shall be discharged. This is just. Otherwise, there would be no consideration for the note which was accepted and regarded by all parties as valid. When a partnership note is surrendered for that of one member of the firm, it is a payment of the note so surrendered.—*Arnold v. Camp*, 12 Johns. 409; *Holmes v. Drake*, 1 Johnson, 34. Why should not the same principle apply in the case when four parties, three of whom have no connection with the original transaction, give their note for the one made by the original debtor? If the note of one person will pay the note given by a partnership, why should not the note of four persons pay the note of two? The reason seems, in the latter case, to be stronger than in the former, because additional, instead of less, security is given.

When a note is given as a collateral security, and is transferred by the creditor, it operates as a payment of the original note.—*Cocke v. Chaney's adm'r*, 14 Ala. 66. When a new note is given for an old one, and it is transferred by the creditor, it should operate as a payment of the note surrendered. That was the fact in this case.

BY THE COURT.—The rehearing is denied.

MORGAN ET AL. *vs.* JONES, ADM'R, ET AL.

[APPEAL FROM DECRETAL ORDER OF CHANCELLOR, &C.]

1. *Appeal from decretal order, &c.; when dismissed.*—Where an appeal is taken from a decretal order, overruling a motion to dismiss a bill for want of equity, this court will of its own motion dismiss the appeal, unless the record shows that the consent of the opposite party or his attorney was obtained before the taking of the appeal.
2. *Rehearing.*—Under the circumstances of this case, a *certiorari* was allowed to bring up matter of record to show jurisdiction of this court to entertain the appeal, and in support of the motion to set aside order of dismissal.

APPEAL from the Chancery Court of Wilcox.

Heard before Hon. ADAM C. FELDER.

S. J. CUMMING, for appellant.

COCHRAN & DAWSON, *contra*.

PECK, C. J.—The appeal in this case is taken from a decretal order of the chancellor overruling a motion to dismiss the complainants' bill for want of equity. The act of the 23d of February, 1866, (Revised Code, § 3486,) permits an appeal to this court from such a decree, but provides, that such an appeal shall be taken *only* after the consent of the opposite party, or his attorney, is obtained to its being taken.

To give this court jurisdiction of such an appeal, the consent of the opposite party, or his attorney, must appear in the record. The record fails to show any consent of the opposite parties, or their attorneys, to the taking of this appeal; therefore, although no motion is made for that purpose, the appeal must be dismissed, as it is a mere nullity, and gives this court no jurisdiction to entertain it. Let the appeal be dismissed at the appellants' cost.

NOTE BY REPORTER.—At a subsequent day of the term, the appellants prayed for a rehearing, and that the order of dismissal be set aside. The grounds of the petition are set forth in the response to the application, which was delivered by

PECK, C. J.—At the last term of this court, the appeal in this case was dismissed, because it was an appeal from a decretal order of the chancellor overruling a motion to dismiss the complainants' bill for want of equity, and because the record did not show that the consent of the opposite party, or his attorney, had been obtained to its being taken as required by section 3486 of the Revised Code.

On the 6th day of March last, a written petition of the appellants was filed with the clerk of this court praying for a rehearing, or that the order dismissing said appeal be set aside, and the cause restored to the docket, with leave to the appellants to move for a *certiorari*, &c., upon the ground that the written consent of the solicitors of the complainant was obtained to the taking of said appeal, before the appeal was taken, and filed with the register, and that the register neglected to send up, as a part of the record, said written consent.

A copy of said consent is made a part of said petition, and said petition is supported by the affidavits of S. J. Cumming, the attorney of appellants, and of the present register of the chancery court, (the register by whom the appeal was granted and the record made out being dead,) that said original consent was on file in his office.

Although no reason is shown why a *certiorari* was not asked for, to perfect the record before the cause was submitted, yet, as the appeal did not suspend the proceedings in the chancery court, the motion to set aside the order of the last term dismissing the appeal, and to restore the cause to the docket, is granted, with leave to the appellants to move for a *certiorari* to perfect the record, by making a certified copy of said written consent, that said appeal might be taken, a part of the record; but, as the said ap-

Neel v. Clay.

peal was dismissed by reason of appellants' fault, they will pay the costs of this application.

Rehearing granted.

NEEL vs. CLAY.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN ON LAND, &C.]

1. *Contract for sale of land; to what, vendor's lien attaches.*—A contract for the sale of lands in this State, to be paid for partly in money and partly in bales of cotton, is such a sale as secures to the vendor all the rights incident to a vendor's lien, upon a failure to deliver the cotton at the time agreed on, and such lien may be enforced by bill in chancery.
2. *Damages; measure for breach of contract to deliver cotton.*—The pecuniary liability on a contract to deliver eleven bales of cotton, weighing each five hundred pounds, is, when the contract is broken, the money value of the cotton on the day agreed upon for its delivery or payment, when no price is fixed in the contract.
3. *Same; when bears interest.*—The value of the cotton on the day of payment, thus ascertained, fixes the amount of the debt against the party bound to deliver the cotton; and this is such a debt as bears interest from the date fixed for the delivery of the cotton.
4. *Same; what rate of interest governs such contract.*—Such a contract is governed, as to interest, by the rate prescribed by the Code; and an attempt to collect a greater rate of interest on such contract than eight per cent. per annum is usurious.—Rev. Code, §§ 1827, 1828.
5. *Principles of law enunciated in foregoing head-notes; applied to facts of the present case.*—C., in 1866, sold land to N. for \$2,000 cash and twenty-three bales of cotton, weighing each five hundred pounds; the money was paid, N. was put into possession of the land, and the cotton was agreed to be delivered about the first of January following; but N. was only able to deliver twelve bales of the twenty-three when the cotton fell due; this left eleven bales unpaid. At the time of the payment of the twelve bales, the cotton was worth thirteen cents per pound; C. was then willing to "indulge" N. "in the payment" of said eleven bales yet "remaining unpaid;" and in order to do so, agreed with him to take a mortgage on his crop of that year, and postpone the payment of the eleven bales of cotton until some time in the year following, but on a second failure to pay the cotton N. was to account for it at thirty cents per pound. On a bill filed by C. against N. to foreclose his vendor's lien on the land sold to N., C.

is entitled to recover only the money value of the eleven bales of cotton when they fell due on the contract of sale, and interest thereon at eight per cent. per annum. Any thing more than this was usurious; and if demanded, only the value of the eleven bales, or what remained due thereon at the date the same fell due on the contract of sale, without interest, could be recovered.—Rev. Code, § 1831.

APPEAL from the Chancery Court of Perry.

Heard before Hon. CHARLES TURNER.

The opinion states the case.

BROOKS, HARALSON & ROY, for appellant.

JOHNSTON & NELSON, *contra*.

[No briefs came into Reporter's hands.]

PETERS, J.—This is a suit in chancery, commenced by Clay, the appellee, against Neel, the appellant, to enforce a vendor's lien for the balance of the price of certain lands mentioned in the bill. The cause was heard in the court below on the bill and exhibits to the bill, the answer and exhibits to the answer, and an agreed statement of facts. Neither the bill nor the answer are sworn to, and the verification of the answer, by oath, is waived. The bill alleges, that in November, 1866, Clay sold to Neel, in this State, certain tracts of land lying in the county of Perry in this State, and put him into possession of the same under the contract of sale thus made. This sale was "for the consideration of two thousand dollars in cash and twenty-three bales of cotton, which said twenty-three bales of cotton were to be paid over or delivered" to Clay by Neel "on or before the first day of January, 1868." The sum of two thousand dollars was paid in cash, as agreed on at the sale, and twelve bales of the cotton were also delivered according to the terms of the contract of sale, leaving eleven bales due and unpaid on the first day of January, 1868. These were demanded, but Neel was unable or refused to deliver them, as was required by his contract. The bill then alleges that Clay, "not desiring to interfere with the planting operations of said Neel, *indulged* him in the pay-

ment of the said remaining eleven bales of cotton due and unpaid on said contract." It is then further alleged, that on the 11th day of April, 1868, Neel executed a mortgage on his growing crop to Clay for the purpose of further securing the payment of the purchase-money for said land. This mortgage is made an exhibit to the bill. And it recites, that Neel was justly indebted to Clay "to the amount of eleven bales of cotton, weighing each five hundred pounds. Said eleven bales of cotton are to net said John P. Clay thirty cents per pound," and to be delivered between the first of September and the thirtieth December, 1868. The bill also avers, that the balance of the purchase-money on said lands is \$1650, with interest from the first day of September, 1868; upon which last said sum said Neel is entitled to a credit of \$275, and interest thereon from the first day of December, 1868. The answer of Neel admits the contract of sale, as set forth in the bill; that the cash payment was made, and that the twenty-three bales of cotton were "to be raised, packed, and delivered by or before the first day of January, 1868." The answer also admits the execution of the mortgage, as shown in the exhibit to the bill; but it is insisted, "that the said mortgage," containing the "stipulations as therein set forth, was executed to complainant by respondent for and in consideration of the indulgence and forbearance which complainant agreed to extend to him as aforesaid, and for no other consideration, and that by reason thereof the same is a contract for the forbearance of goods at a greater rate than eight dollars upon one hundred dollars for one year, and that said contract is illegal and usurious, and without adequate consideration, and that the complainant is not entitled to recover of respondent the amount stipulated for in said mortgage, or any interest upon the amount due him at the time said mortgage was executed." It is also insisted in the answer that, after the execution of said mortgage, in the fall of the year 1868, said Neel delivered to said Clay three bales of cotton, weighing fifteen hundred pounds, on account of his liability to said Clay and in part payment

thereof, and that said cotton last said was sold for more than \$275, and that respondent is entitled to credit for the whole gross amount for which said three bales of cotton was sold, without any deduction whatever; and that no part of the proceeds of said three bales of cotton and the credits to which he is entitled since said last mentioned mortgage was made, should be applied to the payment of the interest on his said liability, but only in the payment of the principal indebtedness. The answer also denies the indebtedness of Neel, as stated in dollars in the bill, and his liability to deliver cotton of any certain grade; and he affirms that upon a proper account he does not owe the said Clay a sum exceeding \$250, which he is ready to pay, upon proper title to said lands being made to him. The facts agreed upon by the counsel of the parties and submitted as part of the evidence in the cause, state the contract of sale as set out in the bill, except it does not show that the twenty-three bales of cotton were to be delivered on or before the first day of January, 1868, but it shows that Clay's bond for title to Neel, which bears date the 14th day of November, 1866, which was the day of the sale, recites that the twenty-three bales of cotton should each weigh five hundred pounds, and be "delivered to said Clay as soon as picked by Neel, during the months of September, October, November, and December, 1867;" and it is admitted that Neel, at the same time, executed a mortgage to Clay on his crop of corn and cotton to be raised on said lands during the year 1867, to secure the delivery of said twenty-three bales of cotton, to be void on condition "if Neel should deliver to Clay twenty-three bales of cotton, netting five hundred pounds each, which was to be delivered between the first day of September and thirtieth December, 1867;" and at the time of the sale cotton was worth twenty-four cents per pound. It is further admitted, that Neel, in November, 1867, delivered twelve bales of cotton to Clay, and Clay demanded the balance due, and threatened to foreclose his mortgage; but at the solicitations of Neel, he, on or before the 30th day of December,

Neel v. Clay.

1867, agreed to extend the time of the delivery of the remaining eleven bales until the ensuing fall, 1868, if Neel would give him a mortgage on his crop to be raised that year, (1868,) and guarantee to Clay that the cotton should net him thirty cents per pound. At the time of this offer, cotton was worth thirteen cents per pound. Neel at length agreed to this, and upon the 11th day of April, 1868, the mortgage mentioned in complainant's bill was executed and delivered as therein shown. In this mortgage Neel acknowledges that his indebtedness to Clay is *eleven* bales of cotton, weighing five hundred pounds each, and to net Clay thirty cents per pound, to be delivered in good order during some time between the *first* of September and the thirtieth of December, 1868. It is also admitted, that middling cotton was worth, in Selma in this State, twenty-four cents per pound on 1st of September, in 1867, and twenty cents per pound on 1st of October, and fifteen cents per pound on 1st of November, and $12\frac{1}{2}$ cents per pound on 1st of December, in the same year, (1867); and that it was likewise worth thirteen cents on 1st of January, 1868, and thirty-three cents per pound on the 11th day of April in the same year, when the mortgage was given, and twenty-seven cents per pound on the 1st of April, 1869, when the bill in this case was filed, and twenty-five cents per pound on the 1st of January of the same year, (1869).

I have thus stated the pleadings and the facts of this case at considerable length, because the case is somewhat anomalous, in whatever aspect it may be considered. Upon the hearing, the learned chancellor decreed in favor of the complainant's right of lien on the land sold, and also directed an account to be taken to ascertain the balance of the purchase-money unpaid, "to the amount of the market value in the city of Selma, Alabama, on the first day of January, 1869, of *eight* bales of low middling cotton, each bale to weigh five hundred pounds." It was also directed that the account thus ordered to be taken on this basis, should charge interest on the amount thus ascertained from the first day of January, 1869. The master ascertained

Neel v. Clay.

and reported the debt to be \$1000, and the interest on the same up to the 27th of April, 1870, the date of the report, \$106; making an aggregate of \$1106. This report was confirmed without objection, and the final decree was in accordance with the same, with directions for a sale of the lands mentioned in the bill, in default of payment of the amount thus decreed, within five days from the date of the final decree. From this decree the appellant, Neel, brings the cause to this court, and assigns the decrees of the court below as error.

There is no question that the land sold by Clay to Neel had not been fully paid for, and that Clay, as the vendor, retained a lien on the land thus sold for security of the payment of the balance of the price unpaid. To this extent he was clearly entitled to relief, unless he had in some way relinquished or forfeited his right.—*Napier et al. v. Jones*, January term, 1872. And the main question in the case is, what was this balance at the date of filing the bill? This is the sole difficulty in the cause. We must look to the contract of sale alleged in the bill, to ascertain this. This contract is clear and free from any question of serious doubt. It is admitted in the answer to be there correctly stated. It shows that the lands mentioned were sold for two thousand dollars, to be paid down in cash, and twenty-three bales of cotton, to be delivered on or before the first day of January, 1868. It also appears, by the vendor's bond for title, which was a part of the contract of sale, that these bales of cotton were to weigh five hundred pounds each. Of the twenty-three bales of cotton, twelve were delivered, as required by the contract of sale, on or before the first day of January, 1868; and as to the eleven other bales, there was a failure to deliver them in time. There was, then, a breach of the contract to this extent. This breach fixed the amount of the indebtedness of Neel to Clay upon the original contract, which is that alleged in the bill, and to which the incident of the vendor's lien attaches. In this contract there was no price fixed upon the cotton. It was a contract to be discharged by the de-

Neel v. Clay.

livery of specific articles. On a breach of such a contract, the indebtedness incurred is the pecuniary value of the articles agreed to be delivered at the date of delivery.—*Rose's Ex'r v. Bozeman*, 41 Ala. 678; *Robinson v. Noble's Adm'r*, 8 Pet. 181; 22 Ala. 515; 3 Par. on Contr. p. 215, note b, 5th ed.; *Jackson v. Waddell*, 1 Stewart, 579; S. C. 1 Smith Cond. 551. Here the day of delivery was the first day of January, 1868. On that day the admissions show that the market price of the cotton was thirteen cents per pound, and the quantity to be delivered was five thousand five hundred pounds, or eleven bales of five hundred pounds each. This would make Neel's indebtedness to Clay on that day the sum of seven hundred and fifteen dollars. This was the sum Clay was entitled to have in *lieu* of the cotton on the first day of January, 1868. But Neel was not able at that time either to deliver the cotton or to pay the money it would have brought in the market; and he asked and obtained *indulgence* for further time to discharge his liability. He was driven to this by his necessities. The admitted facts show that the time of the delivery of the cotton was *extended*, as shown in the mortgage of April 11, 1868, until the next year. The bill is not filed to enforce this mortgage, but only the vendor's lien arising out of the first contract of the sale of the land. The contract set up in the bill is not that admitted in this mortgage. The two contracts are not the same. They fall due at different times, and the price of the cotton was left open in the first case, and fixed in the second. It is not asserted that this second contract preserved the lien upon the lands that was incident to the first, or that it did away with the first contract. This was evidently not the purpose of the parties. And so far as appears from the pleadings and the facts admitted, it had no consideration except the *indulgence* or *extension of the time* for the delivery or payment of the eleven bales of cotton, then remaining due and unpaid, on the price of the land under the original contract of sale. This clearly impresses my mind as a contract for the postponement or forbearance of the delivery of the cotton for

another year. In such a case, the law does not permit a greater increase of the debt than eight per cent. of the thing forborn, for each year of the forbearance. And the statute covers money, or goods, or things in action. I quote the portion of the Code limiting this right below. It is this: "The rate of interest upon the *loan or forbearance* of money, goods, or things in action, is eight dollars upon one hundred dollars for one year, and at that rate for a greater or less sum or a longer or shorter time." "All contracts, express or implied, for the payment of money or other thing, or for the performance of any act or duty, bear interest from the day such money or thing, estimating it at its money value, should have been paid, or such act, estimating the compensation therefor in money, performed." Rev. Code, §§ 1827, 1828. If the rate of interest upon the *loan or forbearance* of goods, money, things in action or upon any contract whatever, is greater than eight per cent., the contract is usurious, and can not be enforced, except as to the principal; and if any interest has been paid, the same must be deducted from the principal, and judgment rendered for the balance only.—Rev. Code, § 1831. What are called "change bills" of one dollar or less are excepted out of this limitation. They bear interest at one hundred per cent. per annum.—Rev. Code, § 1832. This is the settled rule at law in this State.—*Sprague et al. v. Zunts*, 18 Ala. 382; 17 Ala. 761. This view of this statute as to the amount of the recovery is not followed in some cases in courts of chancery, but I think without any valid reason for the departure, and in open violation of the words of the statute.—*Noble & Bro. v. Walker*, 32 Ala. 456; *Hunt et al. v. Acre et al.*, 28 Ala. 580; *Pearson v. Bailey*, 23 Ala. 537. In order to rescue the transaction between the parties from the taint of usury, it may be said that it was a loan of eleven bales of cotton at the date of the last mortgage, on the 11th day of April, 1868, by Clay to Neel, which were to weigh five hundred pounds each, and valued at thirty cents per pound, to be returned in a like quantity of cotton at a like price at the termination of the loan, or to pay for

the same, on a failure of such delivery, the price fixed upon at the loaning. But such a supposition would not comport with the real facts of the case, nor with the allegations of the bill, or with the admitted proofs. But the allegations of the bill, the answer, and the proofs, show that the transaction grew out of a mere forbearance of the payment or delivery of the eleven bales of cotton, which were past due, for another year. Such a transaction can not increase the liability beyond the rate of interest fixed by law.—*Miller v. Bates*, 35 Ala. 580; *Matlock v. Mallory*, 19 Ala. 694; *Bk. U. S. v. Waggener*, 9 Pet. 378, 379.

In this case, after deducting the credit of \$275, which is not disputed, the real indebtedness, by the forbearance or indulgence, was very nearly doubled. And if such contracts are permitted, it might have been quadrupled. It would leave the creditor without a limit upon his harsh exactions, and it would open a door for the utter disregard of the statute, and encourage the most grievous oppressions, which are contrary to the policy of the law forbidding usury, which is so forbidden because it tends to such oppressions, contrary to the principles of courts of equity to enforce.—1 Story Eq. § 307, *et seq.*; *Pauling v. Ketchum*, *adm'r*, June term, 1871; *Balkum v. Brear*, January term, 1872; *Eslava v. Lepetre*, 21 Ala. 504. I therefore feel constrained to treat the contract for indulgence or forbearance of the payment or delivery of the cotton as referred to in the bill and set out in the mortgage of the 11th day of April, 1868, as one in violation of the statute against usury. This deprives the complainant in the court below of all right to interest. This leaves the balance due him on his contract for the sale of the lands, mentioned in the bill, the sum of four hundred and forty dollars. For this sum the decree of the court below should have been rendered, without interest. In exceeding this sum the court erred.

The judgment of the court below is therefore reversed; and this court, proceeding to render the judgment that the court below should have rendered, doth order, adjudge and decree that the said John P. Clay, the complainant in the

court below, and the appellee in this court, have and recover of and from the said Solon Neel, the defendant in the court below, and the appellant in this court, the said sum of four hundred and forty dollars, the balance of the price and purchase-money for the lands mentioned and described in said bill of complaint; and that said sum of money, last above mentioned, is a lien upon said lands in said bill so mentioned and described as abovesaid. It is further ordered, adjudged and decreed that the said Solon Neel, said appellant, pay to the said John P. Clay, said appellee, within ten days after the adjournment of this court, the said sum of four hundred and forty dollars, and in default thereof, that the register of the chancery court of the county of Perry, in this State, proceed to sell, in the manner prescribed by law for sales by sheriffs upon executions at law, the lands mentioned and described in said complainant's bill of complaint; that is to say, one hundred acres lying on the west side of and extending north and south the whole length of fraction "B," west of the Cahaba river, in section thirty-three, and the length of the north-west quarter of the south-west quarter of same section, say two hundred and forty rods long, and wide enough eastward to embrace said hundred acres, lines on each side parallel, less three and 45-100 acres, the same being the lots on which the buildings and well of J. W. and F. Borden were situated in the year eighteen hundred and sixty-one, and situate and lying immediately west of the road leading from Selma to Marion; all lying in section thirty-three, township eighteen and range nine, of the lands subject to sale at Cahaba, Alabama. Also, another tract, beginning at a point on a line due west of the south-west corner of the north-east quarter of the south-west quarter of fractional section number thirty-three, township eighteen, range nine, east, on the west side of Cahaba river, distant three chains and thirty links to a corner, thence north twenty-two minutes east, seventy-nine chains to the west bank of said river, thence with the meanderings of said river to the south-east corner of fraction A of said sec-

Neel v. Clay.

tion, thence due west on the line of the south boundary of said fraction "A" twenty-eight chains and forty links to a corner in the centre of said section, thence south eighty-nine degrees and thirty-eight minutes west, twenty chains, to a corner, thence south sixty-four degrees and thirty minutes west, twenty-two chains and twenty-two links to the south-west corner of the north-west quarter of the south-west quarter of said section, thence due west three chains and thirty links to the beginning, containing one hundred and sixty-six acres, lying and being in said fractional section thirty-three, township eighteen, range nine, east. Also, another parcel of land adjoining the last mentioned tract, beginning at a point three chains and thirty links due west of the north-east corner of the west half of the south-west quarter of said section thirty-three, township eighteen, range nine, east, thence two chains and sixty-eight links, to a corner in the public road leading from Hamburg to Selma, thence with said road north fifty-three degrees, west five chains to a corner, thence south seventeen degrees, west eight chains, to a corner, thence north twenty-two minutes east, to the beginning, containing three and 46-100 acres, more or less; and the south-west quarter of the south-west quarter of section thirty-three, township eighteen, range nine, in the Cahaba land district, containing forty acres, more or less. And upon making said sale the register aforesaid shall execute and deliver to the purchaser or purchasers of said land, at said sale, a good and sufficient deed or deeds of the lands so sold, vesting in the said purchaser or purchasers all the right, title and interest of said Solon Neel, in and to said lands so sold under authority of this decree. And out of the proceeds of said sale of said lands so made by the register aforesaid, he shall pay to the said John P. Clay, said complainant in the court below, the said sum of four hundred and forty dollars, the amount above decreed to him, with interest thereon since the date of the rendition of this decree, up to said sale; (Revised Code, § 1829,) and the balance, if any, together with a proper statement of his acts and

doings in the premises he shall report to said chancery court of Perry county aforesaid, at the term thereof next after said sale. And the said John P. Clay, said complainant in the court below, will pay the costs of this suit, in this court and in the court below.—Rev. Code, § 2781; *Black v. Hightower*, 30 Ala. 317.

GARDNER vs. THE STATE.

[INDICTMENT FOR MURDER.]

1. *Oath administered jury in felony trial; what rental in record as to, sufficient.*
In capital and other felonies, when the oath administered to the jury is set out in the minute entry of the trial, and an essential part of the oath prescribed by section 4092 of the Revised Code is omitted, as, if it omits to state that the jury was sworn "a true verdict to render according to the evidence," the conviction will be erroneous. If, however, the entry does not pretend to set out the oath, but states that the jury "was duly sworn according to law," or "was duly sworn," in either case, it will be presumed the jury was properly sworn, according to the form prescribed in said section.

APPEAL from the Circuit Court of Perry.

Tried before Hon. M. J. SAFFOLD.

The appellant, who was indicted for the murder of Toney Tinsal, was found guilty of manslaughter in the first degree, and sentenced to eight years' imprisonment in the penitentiary. No bill of exceptions was reserved, and the appeal is taken on the record. The defendant was arraigned on the 18th of March and the trial set for the 21st day of March, and actually took place on the 22d day of that month. On the 18th of March an order was entered upon the minutes, that the defendant be served with a copy of the indictment and list of jurors, &c., one entire day before the day set for the trial. The sheriff's return shows

that, on the 19th of March, he executed the order, by delivering to the defendant a copy of the indictment and list of jurors summoned for his trial. The record does not show that defendant was in actual confinement at the time of and before the trial. That portion of the minute entry in relation to the swearing of the jury, after showing the names of the persons drawn and accepted as jurors, to the number of twelve, is as follows: "who, being duly impaneled and sworn, well and truly to try the issue and true deliverance make, between the State of Alabama and Bill Gardner, the prisoner at the bar, and a true verdict render according to the evidence, upon their oaths do say," &c.

POWHATTAN LOCKETT, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

PECK, C. J.—In the case of *Lockett v. The State*, at the last term, it is held, that in a criminal case, if the record shows that the jury was "duly sworn according to law," that was enough.

At the same term, in the case of *Smith v. The State*, it is said, "In a criminal case, the omission of an essential portion of the oath required to be administered to the jury, apparent from the record, is a reversible error."

So, again, at the same term, in the case of *McNeil v. The State*, it is decided, that an appeal in a criminal case, where the judgment entry recites that the jury was sworn "to well and truly try the issue joined," without more, it was apparent that the oath administered to the jury was not attempted to be set out, and this court would presume the proper oath was administered.

And so, again, at the same court, in the case of *Joe Johnson v. The State*, it is held, that in capital cases and other felonies, there are some matters that must affirmatively appear in the record, otherwise, the judgment would be reversed; and among these was the oath administered to the jury; that if it appeared from the record that an essential part of the oath, required by section 4092 of the Revised

Code to be administered to the jury, was omitted, the judgment would be erroneous.

In this last case, the record states that the jury "were duly sworn to well and truly try the issue joined between the State of Alabama and the defendant, Joe Johnson." We held, that an essential part of the oath required to be administered to juries by said section 4092 was omitted, to-wit: It omitted that part of the oath that requires the jury "a true verdict to render according to the evidence." And as the oath was set out and stated in the minute entry, no presumption could be made that any other oath was administered, or that the oath set out was not the entire oath so administered.

The omission above stated was the real objection to the sufficiency of the oath as stated, and being an essential part of the oath required by the statute, &c., the judgment of the court below was erroneous. What is said in the opinion, as to the omission of the words "so help you God," (although they are the most solemn part of the oath, and should never be omitted, yet being a mere *invocation* made by the officer administering the oath, and seldom or never appearing in the fullest and most perfect entries, we think it but fair to presume they were not, in fact, omitted in that case,) gave too much importance to the supposed omission of said words by the officer who administered the oath.

The rule to be derived from the foregoing cases, may be stated as follows, to-wit: That in capital and other felonies, when the oath administered to the jury is set out in the minute entry of the court, and an essential part of the oath required by the statute is omitted, the conviction will be erroneous. If, however, the entry does not pretend to set out the oath, but states that the jury was "duly sworn according to law," or "was duly sworn," in either case it will be presumed the jury was properly sworn, according to the form prescribed in section 4092 of the Revised Code.

In the present case, the defendant, appellant, was indicted for murder, and convicted of manslaughter in the

Parke v. The State.

first degree. The minute entry of the trial states that the jury was duly impaneled and sworn, well and truly to try the issue, and true deliverance make, between the State of Alabama and Bill Gardner, the prisoner at the bar, and a true verdict render according to the evidence. This oath contains all the essentials, and is substantially in the form prescribed by section 4092 of the Revised Code.

The objection of defendant's counsel, that a copy of the indictment and list of the jurors, &c., were not delivered to defendant one entire day before the day appointed for his trial, is not sustained by the record. The sheriff certifies, officially, that he handed to the defendant a list of the jurors summoned for his trial, with a copy of the indictment, on the 19th day of March, 1872, and the order of the court shows that the trial was set for the 21st day of said month, and the record shows that the trial in fact took place on the next day, the 22d of said month. Another reason why this objection is not well taken is, it does not appear that the defendant was in actual confinement.—Revised Code, § 4171.

After a careful examination, we discover no error in the record.

The judgment must be affirmed, at the appellant's costs.

PARKE vs. THE STATE.

[INDICTMENT FOR BURGLARY.]

1. *Confessions of guilt; defendant, when entitled to call for whole of.*—In criminal cases, if the State relies upon the confession of a defendant, he is entitled, on cross-examination, to bring out all that he said, at the same time, on the same subject.
2. *Same; jury may credit part and discredit part of.*—Juries are not bound to give the same credit to every part of a defendant's confession, but may believe that which makes against him, and disbelieve that which makes

in his favor ; for this reason too great strictness ought not to be observed in limiting the cross-examination of witnesses in such cases.

APPEAL from the Criminal Court of Dallas.

Tried before Hon. GEO. H. CRAIG.

The appellant was convicted of burglary in a dwelling house and sentenced to confinement in the penitentiary for three years.

On the trial, the owner of the house testified that on the Sunday on which his house was broken into he went to church, locking up his dwelling house, and leaving defendant, who was in his service, and a nephew, seventeen years old, in the yard. On his return he found the house broken and entered through a window, and that his shot gun, which was left in the house, was missing. "The next day witness and a Mr. Cater met the defendant in the road, (they not having been able to find defendant before that,) a few miles from Selma, and witness, without using any threats, or offering any inducements, asked defendant where witness' gun was. The defendant replied that he had left it at a house behind him and that he would return with witness and Cater and get it. He returned with witness and Cater to the house of one Phillips, to whom defendant said he had sold the gun, called Phillips out, took witness' gun from Phillips and returned him some money, the amount of which witness did not recollect. The counsel for the defendant, on cross-examination, asked the witness to state all the defendant said at the time witness and Mr. Cater met the defendant in the road, when witness asked defendant where his (witness') gun was. The court refused to permit the witness to state all the defendant said at the time referred to, and the defendant excepted."

SATTERFIELD & YOUNG, for appellant.—The court erred in refusing to allow the witness to state all that the defendant said at the time of the alleged confession.—Greenleaf on Ev. I, § 218 ; *Chambers v. The State*, 26 Ala. 59 ; *Nelson v. Iverson*, 24 Ala. 9.

JOHN W. A. SANFORD, Attorney-General, *contra*.—It is conceded that when the State proves a part of the confession of the accused, he can prove the remainder of the conversation on the same subject.—*Bob v. The State*, 32 Ala. 560. But in this case, the question was too broad. Instead of limiting the conversation to what was said in regard to the gun, and the matters involved in the confession, the question was concerning every thing that was said on the occasion, whether it referred to the crime or not.

The breadth of the question would have permitted an answer that might have had no connection with the subject-matter of the confession; and not being parts of the *res gestæ* of the transaction could not possibly have been properly admitted.—*Taylor v. The State*, 42 Ala. 529.

PECK, C. J.—In a criminal case, if the State relies upon a confession of the defendant to show his guilt, he is entitled, on cross-examination, to bring out all that was said, at the same time, on the same subject.—*Greenleaf Ev.* I vol. § 218. If the court refuses to permit this, it is an error, for which the conviction will be reversed.

In this case the State relied mainly on the confession of the accused, made to the owner of house, in regard to a gun which was in the house at the time it was broken and entered, and which gun defendant said he had sold to one Phillips, to whose house the defendant and the witness went and recovered the gun. This confession was made in the road, a few miles from Selma, where witness and a Mr. Cater met the defendant.

On cross-examination, defendant's counsel asked the witness to state all the defendant said at the time the witness and Mr. Cater met the defendant in the road, and asked defendant where his gun was. Without any objection, on the part of the prosecuting attorney, as far as the bill of exceptions shows, the court, of its own motion, refused to allow the witness to state all that the defendant said at the time referred to, and he excepted.

We think the court should have suffered this question

to be answered. It referred to what the defendant said, at the same time and place at which his confession was made, and, fairly interpreted, to the same subject-matter. It was proper that the jury should have the entire confession before them, otherwise injustice might be done to the defendant.

Although juries are not bound to give the same credit to every part of a defendant's confession, but may believe that which makes against him, and disbelieve that which makes for him, yet he has a right to have it all before the jury, that it may all be considered together. For these reasons too great strictness ought not to be observed in limiting the examination of witnesses in such cases. For, if any thing is stated that does not properly refer to the subject-matter of the confession, it can be excluded on the objection of the prosecuting attorney.

Let the judgment be reversed, and the cause remanded for a new trial.

QUARTEMAS ET AL. vs. THE STATE.

[PROSECUTION ON STATEMENT SIGNED BY SOLICITOR FOR LIVING IN ADULTERY.]

Living in adultery; what acts do not constitute, within meaning of Code.—On the trial of a charge for living together in adultery or fornication, if the evidence tends to show that the accused parties lived at different places, it is an error in the court to refuse to charge the jury, at the request of the defendants, that if the jury believe, from the evidence, that the man lived in the jail and the woman at another place, and that they did not live together in adultery or fornication, they should acquit the defendants; and that before the defendants or either of them could be convicted the evidence must satisfy their minds beyond a reasonable doubt, that the defendants "did more than occasional acts of illicit or criminal intimacy."

APPEAL from the Circuit Court of Dallas.

Tried before Hon. M. J. SAFFOLD.

This was a prosecution against the appellants for living together in adultery or fornication, commenced before the criminal court of Dallas county, and resulting in their conviction. The defendants appealed to the circuit court. In the circuit court there was a jury trial, on a statement signed by the solicitor, and the parties were again convicted. From the bill of exceptions it appears that Quartemas was jailor, and lived and slept in the jail, and the woman, Jackson, lived outside, but how far from the jail is not stated in the bill of exceptions.

The first witness for the State testified that he saw the woman Jackson, and the defendant Quartemas lying in the same bed in the day time, in the jail, and he once saw Quartemas with his arms around her. This witness "turned the woman in Quartemas' room several nights, and turned her out again, and once saw her undressing in his room." Two other witnesses testified that "they saw defendant Quartemas come out of Bender's gate, at good light, at which place Polly Jackson lived, and that she followed him to the gate and looked after him." Another witness for the State testified that she saw the woman Jackson once in Quartemas' room, and saw her three times in jail.

There was some other testimony, going to show that the defendants had once or twice been seen walking together after night, and that the woman Jackson had been seen to jump from the jail window; that on one occasion Quartemas had been seen to throw the key down to her to let her out the gate, and that the woman had been seen to go out five or six mornings.

The defense introduced some testimony of a negative character, to the effect that defendant's witnesses were about the jail, and had ample opportunity to observe the conduct of the defendants, and did not see the conduct testified to by the State's witnesses, and also proved that the character of two of the State's witnesses for truth and veracity was bad.

There were several exceptions reserved to the rulings of

the court below, which need not be further noticed. The defendants, among other written charges asked, requested the following, which the court refused to give, and the defendants duly excepted, to-wit: "If the jury believe, from the evidence, that the defendant Quartemas lived in the jail, and the defendant Jackson lived in her own dwelling, and that they did not live together in adultery or fornication, they should acquit the defendants, and that before they or either of them can be convicted the evidence must satisfy the minds of the jury, beyond a reasonable doubt, that the defendants did more than one occasional act of illicit or criminal intimacy."

G. W. GAYLE, for appellants.—The court erred in refusing the first charge asked. The ruling in *Collins v. The State*, (14 Ala. 608,) is about as far as the statute can be stretched, and even that case does not support the refusal to give the charge asked. There must be a *living together*, something continuous enough to attract attention and corrupt morals.

JNO. W. A. SANFORD, Attorney-General, *contra*.

PECK, C. J.—I have examined the record and bill of exceptions in this case, and find but one available error, and that consists in the refusal of the court to give the first charge asked by the defendants. Taken in connection with the evidence, this charge should have been given. Occasional acts of criminal intimacy do not make out the offense named in the statute.—*Collins v. The State*, 14 Ala. 608. The parties accused must live together in adultery or fornication, or at least the conduct of the parties must be of such a character as to become, openly, an evil example—an outrage upon decency and morality. In the case of *Collins v. The State*, *supra*, it is decided that a married man who visits and remains with his paramour one night in every week, and sometimes oftener, for seven months, at her residence, but half a mile from his own house, is guilty

 Hunter v. The State.

of living in adultery within the meaning of the statute. This is going quite as far as any reasonable interpretation of the words of the statute will permit.

Let the judgment be reversed, and the cause remanded for another trial.

HUNTER *vs.* THE STATE.

[INDICTMENT FOR LARCENY.]

Appeal in criminal cases; duty and practice of supreme court as to.—In this case, no question of law having been reserved by bill of exceptions, and none otherwise distinctly appearing on the record, no errors having been assigned, and no counsel appearing and arguing the case or furnishing a brief to the court, the judgment of the court below was affirmed. It is not the duty of the court to hunt or fish for errors in such a case.

APPEAL from the Criminal Court of Dallas.

Tried before Hon. GEO. H. CRAIG.

The appellant was tried in the court below, on an indictment for grand larceny, convicted and sentenced to the penitentiary for two years. The appeal was taken on the record alone. No errors are assigned, and no counsel appeared or furnished a brief for the prisoner in this court.

PECK, C. J.—Although, in criminal cases, no assignment of errors is necessary, but the court must render such judgment, on the record, as the law demands—(Section 4314, Revised Code)—yet, the record must, in some way, present the questions for the consideration of this court.

How this is to be done, is indicated by section 4302, Revised Code, which is as follows, to-wit: “Any question of law, arising in any of the proceedings in a criminal case, tried in the circuit or city court, may be reserved by the

defendant, but not by the State, for the consideration of the supreme court; and if the question does not distinctly appear on the record, it must be reserved by bill of exceptions, duly taken and signed by the presiding judge, as in civil cases." For instance, if there is a demurrer to the indictment, which is overruled, the question will appear distinctly, without a bill of exceptions, if, however, evidence is admitted for the State, against the defendant's objection, or excluded when offered by him, it will not appear on the record, without a bill of exceptions, and if the defendant wishes to revise the decisions of the court against him, he must put them on the record, by a bill of exceptions.

In this case, no question of law has been reserved by the defendant, either by demurrer, bill of exceptions, or otherwise, and there is no assignment of errors. There was no argument, nor has any brief been furnished to the court. In such a case, it is not the duty of this court to hunt or fish after errors. Nevertheless, the record has been examined without discovering any error in the proceedings of the court below. The judgment is, therefore, affirmed. The sentence of the court below will be carried into execution, and the appellant will pay the cost.

FULLER vs. THE STATE.

[INDICTMENT FOR BURGLARY.]

1. *Burglary in a dwelling house; what necessary to constitute.*—There can be no conviction on an indictment for burglary in a dwelling house, unless it is proved that some one resided in the house.
2. *Possession of goods; what necessary to make evidence against accused.*—To make the possession of goods evidence against a person charged with stealing them, the larceny must be proved.

APPEAL from the Criminal Court of Dallas.

Tried before Hon. GEO. H. CRAIG.

The appellant was indicted for burglary in a dwelling house, and convicted. The indictment contained two counts; the first charging the burglary in the dwelling house of John Robbins, and the second in that of Peyton Borge.

There were but two witnesses examined, and both on the part of the State. The first witness, John Robbins, testified, in substance, that he knew the house reported to have been broken open; that it was his house; that it was in Dallas county; that having heard a description of a man loitering about the house, shortly before it was reported to have been broken open, he went in search of him, found defendant, and after some conversation with defendant, called in Peyton Borge and told him defendant was the man they were after; that defendant ran, and Robbins and Borge pursued and captured him; that when defendant was brought back to the house from which he ran, defendant went into the yard and took up a carpet bag which he had left. This carpet bag contained a pair of pants and some other clothes. The pants "were the same that the witness had a short time before given to some of the boys on the place." Borge claimed the carpet bag and things in it in presence of defendant, who answered that he had had the carpet bag and things all the time, and that they belonged to him."

The other witness, Huey, testified that he saw defendant near the house a short time before it was reported to have been broken into; that "on that evening the carpet bag found in possession of defendant was hanging up behind a door in the house; that it was the same bag he saw hanging up in Peyton's house; that when he saw defendant loitering about the house, it was late in the evening, and witness was cutting wood for Mrs. Robbins and ate his dinner at Peyton Borge's house; that when Peyton left the house in which the carpet bag was, he shut and locked the door, and then put the key in a crack."

This was the substance of all the evidence. The defendant requested the court to give the following written charges :

1st. The fact that the goods were stolen has not been proved by competent evidence, and if the possession of the goods is the only evidence to prove the burglary, the jury must acquit the defendant.

2d. If you believe the evidence, you must acquit the defendant.

The court refused to give either of said charges, and the defendant excepted.

SATTERFIELD & YOUNG, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

PECK, C. J.—We think both the charges asked by the defendant should have been given.

The evidence was insufficient to prove that the house had been broken and entered by the defendant; it did not prove that the house had been broken at all. Nor was there any evidence that the carpet bag had been in fact stolen. In other words, no larceny was proved.

To make the possession of goods evidence against a party charged with stealing them, the larceny must first be proved, and then the possession of the stolen goods *may* be presumptive evidence of guilt, unless the party found in the possession of goods can show how he came by them.

Neither did the evidence prove that the house, charged to have been broken and entered, was a dwelling house. A dwelling house is the apartment, building, or cluster of buildings, in which a man with his family resides.—1 Bishop's Cr. Law, § 295.

The evidence did not show that any family resided in the house charged to have been broken and entered. It clearly was not the dwelling house of the witness Robbins, and the evidence failed to prove that Peyton Borge resided in the house.

The judgment must be reversed, and the cause remanded for a new trial.

KIRKSEY ET. AL. *vs.* FRIEND.

[BILL IN EQUITY BY HUSBAND AND WIFE, TO HAVE INDEMNIFYING BONDS GIVEN TO THE SHERIFF, TO INDUCE HIM TO LEVY ON AND SELL, UNDER EXECUTION, AGAINST THE HUSBAND, PROPERTY CLAIMED BY THE WIFE, AND UNDER WHICH THE PROPERTY WAS SOLD, DECREED TO BE EQUITABLE ASSETS OF THE SHERIFF AND TO COMPEL THE OBLIGORS THEREIN TO CONTRIBUTE PRO RATA, &C., TO THE PAYMENT OF A DECREE OF THE CHANCERY COURT AGAINST THE SHERIFF, HE BEING INSOLVENT, IN A SUIT IN CHANCERY, GROWING OUT OF AND SETTLING THE RIGHTS IN THE SAID PROPERTY OF THE WIFE SOLD BY THE SHERIFF, &C.]

1. *Decree of court held during rebellion; when collection of, will be enforced in present State courts.*—Mrs. F. and her husband, on the 17th day of June, 1861, obtained a decree in a chancery court, held under the rebel authority, in the county of Greene, in this State, for the use of Mrs. F., as her separate estate, under the will of her father, made in 1838, against O., sheriff, for an improper levy and sale of her property, for \$5,227.48. On this decree execution was issued, and returned “no property found” against O., who was insolvent,—*Held*, that a court of chancery will entertain jurisdiction to enforce the collection of said decree, in the name of the husband and wife in a proper case, as for her separate estate at common law, when the marriage was before our statute upon the separate estate of wife.
2. *Indemnifying bonds; when not void; when chancery will entertain jurisdiction to compel obligors on, to contribute pro rata, &c.*—O., as the sheriff of said county of Greene, having numerous executions on judgments at law against F., was induced by the parties interested in said executions to levy the same on property belonging to Mrs. F., wife of F., as her separate estate at common law, which property was sold by the sheriff under said levies, and the proceeds applied to the satisfaction of said judgments against the husband; but before the levy and sale, and in order to induce the sheriff to seize and sell said property of the wife, the parties interested in said judgments executed to the sheriff sundry bonds, for the purpose of indemnifying him against liability to Mrs. F. for making such levy and sale, in the event that the property thus seized turned out to be her property, and not subject to said executions, thus in the hands of said sheriff,—*Held*, that the bonds thus executed were not void, whether they were made as statutory bonds to indemnify the sheriff, or bonds at common law, if there was doubt as to the title of the property, proposed thus to be levied on, which rendered it liable to satisfy said executions, and that Mrs. F. and her husband might file her bill in chancery to compel the obligors to said bonds to contribute *pro rata*, in proportion to the

amounts of the several penalties of said bonds, to the payment of her decree against said sheriff for the improper seizure and sale of her separate property under said executions, thus induced to be made by them through the agency of said sheriff, her decree being that of a rebel court, on which it is doubtful whether any process of garnishment can be issued to aid in its collection.

3. *Indemnifying bonds in present case; when condition of was broken.*—The condition of said bonds was broken as soon as there was a liability fixed against the sheriff in favor of Mrs. F. by decree in her favor, which the obligors in said bonds refused to pay.

APPEAL from the Chancery Court of Greene.

Heard before Hon. A. W. DILLARD.

The facts are sufficiently stated in the opinion.

J. T. JONES, for appellant.

ROBT. H. SMITH, *contra*.

[No briefs came into the hands of the Reporter.]

PETERS, J.—This is a suit in chancery, commenced by Ann V. Friend and her husband, John G. Friend, on the sixth day of January, 1868. John G. Friend, the husband, has died since the bill was filed, and the cause has proceeded in the name of Mrs. Friend alone. There are seven paragraphs in the bill, which, among other things, recite, but not in the order of the pleading, that Mrs. Friend and her said husband sued William C. Oliver, former sheriff of Greene county, in this State, in the chancery court of said county of Greene, on the twenty-seventh day of February, 1856, for a wrongful seizure and sale of certain cotton and wagon, the separate property of Mrs. Friend, derived from the will of her father, Henry Minor, deceased, who died in 1838. The cotton and wagon above mentioned had been seized by said Oliver, as such sheriff, as the property of said John G. Friend, in November, 1853, under sundry executions then in the said sheriff's hands, against said John G. Friend. In the suit thus commenced in 1856, by Mrs. Friend and her said husband, against Oliver, a final decree was rendered by the chancel-

lor in favor of the complainants, by which it was ordered, adjudged and decreed "that the defendant (said Oliver) pay to the plaintiffs, for the use of the plaintiff, Ann V. Friend, and as of her separate estate, under the last will and testament in the bill mentioned, the sum of \$5,227.48," and "interest thereon from the 17th day of June, 1861, until paid." This decree bears date the 22d day of June, 1861, and execution was issued thereon against said Oliver and regularly returned "no property found." It is also alleged that Oliver is insolvent in law and in fact. The bill in this case further recites that said decree remains wholly unpaid and in full force. It is also shown that Oliver, as such sheriff as aforesaid, at or before he made said seizure and sale of said cotton and other property, levied on as the property of said John G. Friend, had in his hands for execution various *fi. fas.* against said John G. Friend and others, in favor of sundry judgment creditors, who are all particularly named in the bill; and that these creditors, and certain of the sureties of said John G. Friend, who were his co-defendants in certain of said judgments on which said *fi. fas.* were issued, desired said sheriff to levy on said cotton and other property named in the bill, as the property of said John G. Friend, but said sheriff, being doubtful about the title, was unwilling to make such levy and seizure of said cotton and other property under authority of said writs of *fi. fa.*, unless the several parties interested therein would first give to him bonds of indemnity therefor. Thereupon, the bonds required were executed and delivered to said Oliver as such sheriff. They all bear date in November, 1853. There are eleven of them, and they are made exhibits to the bill. The condition of one is cited below as an example of all the rest. It is in these words: "Now, therefore, if the said John C. Johnson and his said securities shall and will pay, and truly indemnify and save harmless, protect and defend said William C. Oliver, sheriff of Greene county as aforesaid, from and against all loss, liability, damage and expense he may incur or sustain or be

put to by reason of the said above-named levy, or any levy and sale he may make of the said property, or any part thereof, then this bond shall be null and void, but otherwise in full force and effect." Said Johnson is an obligor in three of said bonds. One is given by him as the surety of said John G. Friend in sundry judgments mentioned therein. Two others are given by him as a judgment creditor of said John G. Friend, and Kirksey and Coleman are his sureties; and the penalty of these bonds is above \$24,000. One of the bonds of LaFayette M. Minor is also given by him as the surety of said John G. Friend, on the contracts in judgments against them. The other bonds are indemnifying bonds, such as are given to the sheriff when reasonable doubt exists as to the title and liability of the property sought to be seized under execution against the judgment debtor. The penalty of all these bonds is above \$30,000. The bill also alleges a fraudulent conveyance of certain lands by Johnson, and a fraudulent concealment of effects by Oliver, for the purpose of preventing Mrs. Friend from procuring satisfaction of her decree against Oliver, and prays a discovery. All the parties to the bonds are made defendants to the bill, who were in life at the date of the commencement of the suit; and the bill concludes with a prayer for general relief, and that the bonds aforesaid be treated as equitable assets of said Oliver, and subjected to the satisfaction of Mrs. Friend's said decree. There are several demurrers to the bill, but they merely assail its equity, and it is needless to set out the special grounds upon which they rest. At the hearing, the chancellor overruled the demurrers, and decreed the relief asked, and ordered an account to be taken by the register, so as to apportion the sums to be paid by each set of obligors in said bonds *pro rata*, according to the amount of the penalty of each bond. From this decree the defendants below appeal to this court.

The property of Mrs. Ann V. Friend, which this litigation seeks to restore to her, is the amount of money decreed to be paid her by the judgment in the chancery suit

against Oliver, commenced in 1856, which judgment was rendered on the 22d day of June, 1861, for the sum of \$5,227.48. This decree is not void, but is entitled to such validity as should be given to the decree of a court of a foreign government.—*Martin v. Hewitt*, 44 Ala. 418. It is *prima facie* correct, and is, so far, to be considered final, that it must be shown to be wrong on the merits, or that the court acted without jurisdiction, before it can be altered or disregarded.—Story Conf. L. § 608. This decree fixes the character of Mrs. Friend's estate, in the recovery, to be her separate property, derived from the will of her father, Henry Minor, who died long before the promulgation of the Code and the statutes therein referred to, which regulate the estates of married women in this State. This decree is not assailed as a judgment wrong upon the merits, or for want of jurisdiction. It is, therefore, sufficient until so assailed. Her estate in the moneys thus decreed to her is a separate estate at common law, and not an estate under the Code, regulating the property of the wife.—*Friend v. Oliver*, 27 Ala. 532. As such, she was authorized to go into a court of chancery, either with or without her husband, if he refused to join her in the suit, to seek enforcement of her rights, whatever they might be. She could not sue at law.—*Pickens and wife v. Oliver*, 29 Ala. 528. This suit, then, was brought in the proper forum.

It is urged by the learned counsel for the appellants, that the bonds of Johnson and LaFayette M. Minor are invalid; that they are not such bonds as are authorized by the statute for the purpose of indemnifying the sheriff against the consequences of an improper levy, when there are reasonable doubts as to the titled liability of the property proposed to be seized under the execution, and consequently they are wholly unauthorized, without consideration and void. From the facts of this case, this does not necessarily follow. Johnson and Minor were the sureties of John G. Friend on the contracts in judgment against them, before the judgments were rendered. This entitled them to make application to the sheriff to levy on

the property of the principal first. It is true, that the statute points out how this may be done, by filing with the sheriff the affidavit of the surety as required by the statute.—Rev. Code, § 2862; Code, § 2448. But if the parties choose to adopt a different mode to enforce this right, and one not forbidden by law, or immoral, or repugnant to the public policy of the State, or the general government, I see no reason why they may not be allowed to pursue it. When the parties are competent, the right to enter into contracts of all kinds is unlimited, except some law forbids them.—1 Pars. Contr. § 4. It is, however, said that these bonds are unlawful, because they were given without authority of the statute to induce the sheriff to do an unlawful act. But it seems that this is not a just inference from the facts. Much of the property sought to be made liable to the levy, turned out to belong to John G. Friend, the defendant in the executions, and only the cotton, which was part of it, proved to be the separate property of Mrs. Friend, and the liability of all of it to satisfy the executions was thought to be reasonably doubtful. It was to settle this doubt as to all the property pointed out to the sheriff, that the bond was given. It was competent to settle this, under the levy, and to take the means to do so was not an illegal act. Johnson and Minor were both deeply interested in having this done. It is true that it was not done in the ordinary way, but at the same time, it was not illegally done. The plaintiffs in those judgments could have done it in the same way, without a violation of law. Otherwise, indemnifying bonds would be worthless, if the property seized under the execution should happen to be not subject to the levy.—Rev. Code, § 2858; Code, § 2444; *ib.* § 3016, *et seq.*; Code, § 2587. I see no valid reason, therefore, why the same thing that is made compulsory by the statute between the plaintiff and the sheriff, may not be allowed to be done on agreement between the sheriff and a surety-defendant, with a view of reaching the same end. A legal thing may always be done in a legal way. This is the effect of that principle of universal jus-

tice that gives a remedy where there is a right.—Broom's Max. 91, marg. Here, Johnson and Minor each expected a benefit from their contracts—their bonds—and they stipulated for a benefit and doubtless received it; and the sheriff incurred a heavy liability at their requests. This is a sufficient consideration to support such contracts at common law.—1 Pars. Contr. sec. 11, p. 67–8; 1 *ib.* p. 430, 431. It may be said that the sheriff was bound to do what he did do, without the bonds, but he was not bound to act without an affidavit required by the statute, in favor of the surety-defendants in the executions in his hands for levy and satisfaction, unless he chose to act upon a special agreement with such surety-defendants. This latter course, by agreement, they chose to pursue. I therefore feel bound to hold that these contracts are sufficient as common law agreements, and bind the parties to perform them. The other bonds of the plaintiffs in the judgments, on which the executions had been issued, were simply bonds of indemnity to the sheriff, and are good under the statute.—Rev. Code, § 2858; Code, § 2444.

But the novelty, and the chief difficulty in this case, is the point next to be considered. It is this: Is Mrs. Friend entitled, in this way, to resort to the bonds aforesaid in order to enforce the collection of her decree against Oliver of the 22d of June, 1861, for \$5,227.48? She is not a party to these bonds, and they have not been assigned or transferred to her by the sheriff. But they were given, in part at least, in order to subject property claimed by her to the use of the obligors, by a sale under the executions against them. The benefit that they expected was to come from her. She, in effect, furnished the consideration which, by operation of law, passed to them. The sheriff was a mere agent, engaged in executing a power for the benefit of the parties to the judgments. The bonds were not given to him for his private profit, or to enable him to convert the property of Mrs. Friend to the use of the obligors in the bonds, but to furnish him with the means of indemnifying her, in the event that the property seized

proved to belong to her. If it turned out that she was not in fact injured, then the condition of the bonds were not broken. Had there been a deposit of the money, named in the penalty of the bonds with the sheriff, instead of the bonds, no doubt after the sheriff's insolvency, and the ascertainment of the amount of the injury to her, "right and justice" would require that it should be paid over to her. In equity she was the real party to be indemnified. She was the ultimate sufferer. In chancery, the court seeks to deal with the real parties, and leaves the merely nominal parties out of the question. In the whole transaction it seeks to visit the burden upon the parties who have enjoyed the benefit. *Qui sentit onus, sentire debet et commodum*.—Broom's Max. 2 Stew. 378. The person who suffers the injury ought to have the advantage of the indemnity. Here, the intent was common, and the result was common, and the profit was common to all the parties to the bonds. All the parties to the bonds acted through the instrumentality of the sheriff to assail Mrs. Friend's rights of property. She was injured by their action, and they were benefited, and not the sheriff. The sheriff is insolvent. The remedy against him is merely nominal. The obligors to the bonds agreed to stand behind him, and furnish him, each, *pro rata*, according to the amount of the penalty of their several bonds, with the means to indemnify her for the damage she might sustain by their action. It would be a disregard of all the principles of "right and justice" to suffer them to escape and shuffle the responsibility off on the sheriff, who was merely their agent, and irresponsible. It may be difficult to find adjudicated cases precisely in point to support the decree of the learned chancellor in the court below; but when it is remembered that cases do not make principles, but that principles make cases, it seems to me that it must be admitted, if the principles upon which the cause has been decided are in conformity with "right and justice," as administered in courts of equity, it stands upon a better foundation than any case that could be cited in opposition to such a judgment.

Even at law, where the court is fettered by the technicalities of contracts and a much narrower procedure than in chancery, the rule is almost as broad as that here intimated. These moneys, in the hands of one person, which, *ex equo et bono*, should be paid to another, may be recovered in *assumpsit*, which is an equitable action.—*Hitchcock et al. v. Lukens & Son*, 8 Port. 333; 5 Smith Cond. R. 303; see also, *Lovejoy v. Murry*, 3 Wall. 1; *Guille v. Swan*, 19 Johns. R. 381; 2 Robinson's Pr. p. 299, 300.

Besides, the basis of Mrs. Friend's claim is, in effect, a foreign judgment. On such a judgment, the legal remedy by garnishment, possibly, could not be exerted against the debtors of Oliver, or persons having possession of his property. At least such remedy is doubtful and not well ascertained. This would be sufficient grounds to resort to a court of chancery.—*Bynum & Sims v. Sledge*, 1 Stew. & Port. 135; 2 Smith Cond. R. 416. Chancery will also take jurisdiction when it would prevent a circuitry or multiplicity of actions at law. Here, a proceeding by garnishment at law would involve the necessity of eleven litigations instead of one, because the parties to each bond would be entitled to answer and litigate their liability, if summoned, in separate and distinct issues, and it might be necessary to summon all in order to secure the satisfaction of Mrs. Friend's judgment and decree against Oliver.—*Morgan et al. v. Morgan et al.*, 3 Stew. 383; 2 Smith Cond. R. 314; Rev. Code, § 2974; Code, § 2546; Rev. Code, § 2892. There can be no doubt that the condition of these bonds is broken. They were given to protect Oliver not only against loss and damage, but also from *liability*. As soon as Oliver's liability to Mrs. Friend was fixed by the decree of June 22d, 1861, for \$5,227.48, and the obligors failed to discharge it, their bonds were broken. The bonds, then, are assets of Oliver, which might be resorted to on process of garnishment, in favor of Mrs. Friend, if her judgment was a decree of a legitimate court.—Rev. Code, § 2892.

These bonds are not barred by the statute of limitation, applicable to them, which is ten years.—Rev. Code, § 2900;

Code, § 2476. The period of the interregnum, during the supremacy of the rebellion, from the eleventh day of January, 1861, to the 21st day of September, 1865, is to be deducted in estimating the time of the limitation.—*Fox v. Lawson, adm'r*, 44 Ala. 319. After this deduction ten years had not elapsed from the date of the bonds to the commencement of this suit. The bonds bear date in November, 1853, and the suit was commenced in January, 1868. This would leave above six months of the time of the statute to run, leaving out of consideration other questions that might intervene to influence the decision on this point of the case.

The decree of the learned chancellor in the court below is correct, and in conformity to "right and justice," as administered in a court of chancery.—Const. of Ala. 1867, Art. I, § 15. It is therefore affirmed at the cost of the appellants, in this court and in the court below.

EX PARTE BELL.

[APPLICATION FOR MANDAMUS.]

1. *Mandamus; when will not lie.*—A mandamus will not be granted to let in a mere technical defense, founded on defective service of process, and to compel a judge of a circuit court to set aside a judgment by default, because the sheriff has made a false return of service of the summons and complaint on the defendant, when the judgment is on a promissory note, unless the application shows a meritorious defense to the note.

This was an application for mandamus. The facts upon which it is based are sufficiently stated in the opinion.

JOHN HENDERSON, for petition.

JOHN W. INZER, *contra*.

Ex parte Bell.

PETERS, J.—This is an application for *mandamus*. The ground set out in the petition is as follows: On the 4th day of April, 1871, Jeremiah Collins sued petitioner, John Bell, by summons and complaint on a promissory note, for \$400, in the circuit court of St. Clair county. The note bears date in October, 1861, and became due one day after date. The summons was served by the sheriff of said county of St. Clair, and his return was in the following words: "Received in office, April 5th, 1871, executed by handing the within copy, April 12th, 1871." Signed, "John C. Brown, sheriff." After the return of this process into court, by leave of the court properly granted, the sheriff amended his said return so as to make it appear that the process was served by handing a copy of the summons and complaint to the defendant. On this process so served judgment by default was rendered by the court, against the defendant, the said John Bell, at the spring term of said circuit court, in 1872, for the amount of said note, interest and costs. During the same term of said court, said John Bell, this petitioner, by his attorney as *amicus curiæ*, moved the court to set aside said judgment and strike said cause from the docket, on the ground that said sheriff had not executed or served said summons and complaint on petitioner, and that said return of service was false. The court refused these motions, and the said John Bell excepted to the ruling of the court and reserved his objections in his bill of exceptions. And he now comes here and moves this court, on the matters of his bill of exceptions, for a writ of *mandamus* to compel the learned judge of the circuit court to grant said motions.

Mandamus is in the nature of an equitable remedy. The petitioner who seeks its assistance must show that he has suffered some substantial injury to some well ascertained right. Here, there was no proof that the debt was not just, and due, and a subsisting claim. The petitioner does not assert that he has any meritorious defense to the note. He merely seeks the use of a remedy, where he shows no meritorious right to redress. The applicant in this case

seeks to get rid of a judgment, to which he has no defense, on the merits, but if any, a merely technical defense. This would not be good in equity, and is never allowed. He must show merit before he is entitled to relief.—*Bennet v. Fuller*, 4 Johns. R. 486; *Bowen v. Russell*, 6 Wend. 511; *McCarney v. McCamp*, 1 Ashm. 4; *Grottick v. Bailey*, 5 B. and C. 703. It was long ago said of this remedy that "it was introduced to prevent disorder, from a *failure of justice and defect of police*." Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, *in justice or good government*, there ought to be one.—*Rex v. Parker*, 3 Burr, 1265. A mere technical defense is not sufficient; and this is all that is relied on here. The correction of the sheriff's return is not matter of error. It is conclusive.—*Watkins v. Gayle*, 4 Ala. 153, 155; *McGehee v. McGehee*, 8 Ala. 86, 87. The application shows no meritorious defense to the note on which the judgment is rendered. It is therefore denied with costs.

MILNER vs. RAMSEY, ADM'R.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN.]

1. *Material defendant, who is not; where bill must be filed to enforce lien on land.*
Where a bill is filed to set up and enforce the vendor's lien on lands for the payment of the purchase-money, a mere tenant or agent in possession of the land, claiming and having no title or interest in the land, and not charged with any fraud, is not a material defendant.
2. *Same.*—A bill thus filed against the purchaser of land, who is a resident and freeholder of another county of the State than that in which the lands lie, and where the bill is filed, and against a mere tenant residing on the land, will be dismissed without prejudice. In such a case, the bill should be filed in the chancery court of the district in which the purchaser resides.

Milner v. Ramsey, Adm'r.

APPEAL from the Chancery Court of Marshall.

Heard before Hon. WM. SKINNER.

The bill in this case was filed by the appellee, Lovic P. Ramsey, as the administrator of B. B. Ramsey, deceased, against the appellants, Henry Milner and William Milner, to set up and enforce a vendor's lien on certain lands lying and being in the county of Marshall. It states, in substance, that complainant's intestate, B. B. Ramsey, on the 9th day of December, 1858, bargained, sold and conveyed the lands to defendant Henry Milner; that for a portion of the purchase-money, two thousand dollars, Henry Milner gave his bond, bearing date the same day, and payable to said deceased on the first day of February, 1860, went into possession of said lands, and from that time to the filing of said bill, by himself and tenants, continued in the possession thereof; that defendant William Milner, at the filing of the bill, was in the possession of the lands, holding and claiming the same as the tenant of said Henry Milner. The prayer of the bill is, that complainant may be declared to have a lien on said land for the payment of said bond; that defendant Henry Milner may be required to pay said bond, and in default of payment, that said lands be sold to pay the same; and for such other and further relief as might seem meet and proper, and the facts of the case might require. No relief is prayed against the defendant William Milner.

Both defendants answered; the defendant William Milner stating, in substance, that he is residing on lands in Marshall county, which he believes are owned by his father, Henry Milner; but that he has no interest, right or title to the same, and no pecuniary interest in said suit, more than any other child of his father, so far as he is aware. He also demurs to the bill, and, among other causes, sets down that it does not appear by said bill that he had any interest in the matters and things alleged in said bill, or ought to be a party thereto.

Defendant Henry Milner admits the purchase of said

Milner v. Ramsey, Adm'r.

lands of deceased; that he made the said bond for part of the consideration of the purchase of said lands, and that his son, *as his agent*, is in possession of a part of said lands; and, in his answer, pleads to the jurisdiction of the court, because, he says, that at the time said bill of complaint was filed, and at the time the process of subpoena was served on him, and at the time of filing his answer, he was a resident in the county of Wilcox in this State, in which county the process issued was served upon him, and a freeholder of this State, and was not a resident of said county of Marshall, either when said bill was filed, or when the process was served on him, nor was he then a resident of said county of Marshall; and that said William Milner had no interest in the subject-matter of said suit.

The complainant, by his counsel, made the following admissions in writing, to-wit: "In this cause, complainant admits that defendant Henry Milner resided, at the time of suit brought and service of subpoena on him, in the county of Wilcox and State of Alabama, and was a freeholder in said State; also agrees that the several statements in the answer of said Henry Milner shall be received with the same force and effect, as if they had been made by him in a deposition properly taken, subject to the exceptions only which said Milner's deposition would be obnoxious to, if taken."

The cause was submitted for a final decree, on the pleadings and proof, and by consent of the parties held under advisement for decree in vacation. The chancellor decreed that complainant, as the administrator of said B. B. Ramsey, deceased, had a lien on said lands for the payment of the said bond of defendant Henry Milner, and unless he paid the same within sixty days from the date of said decree the said lands should be sold, &c.

The decree takes no notice of the demurrer of defendant William Milner, nor of the plea of the defendant Henry Milner.

WYETH & BOYD, and GOLDTHWAITE & SEMPLE, for appellants.

WALKER & BRICKELL, *contra*.

PECK, C. J.—The statements in the bill do not show that William Milner was a material defendant. No relief was prayed, and no decree rendered against him; and the proof, the written admissions of the complainant, and the statements in the answer of defendant Henry Milner, which by said admissions are made evidence, clearly show that he had no interest in the subject-matter of the suit; that he was in the possession of said lands, as the agent of said defendant Henry Milner. A person who has no interest in the suit, and against whom, if brought to a hearing, no decree could be rendered, as, for example, an agent not charged with fraud, should not be made a party defendant to a bill.—Story's Eq. Pl. § 231; Eq. Jurisp. § 1499. As it was admitted that the defendant Henry Milner was a resident of the county of Wilcox, and not of the county of Marshall, the bill was improperly filed in that county; therefore, the plea of defendant Henry Milner should have been sustained, and the complainant's bill dismissed. By section 3326 of the Revised Code, a bill must be filed in the chancery court of the district in which the defendants, *or a material defendant, resides*, unless all the defendants reside out of the State.—*Johnson v. Shaw*, 31 Ala. 592.

In the case of *Lewis v. Elrod*, (38 Ala. 17,) it is decided that a material defendant is one *who is really interested in the suit, and against whom a decree is sought*. For these reasons, and on these authorities, the decree of the chancellor must be reversed; and this court, proceeding to render such decree as should have been rendered by the court below: It is ordered, adjudged and decreed, that the complainant's bill of complaint be, and the same is, hereby dismissed, but without prejudice. It is further ordered, adjudged and decreed, that the appellee pay the costs in this court and in the court below.

WELCH *vs.* MAYOR AND COUNCIL OF MARION.

[ACTION TO RECOVER MONEY PAID UNDER PROTEST.]

1. *Appeal from non-suit taken on rulings on pleadings; practice of taking not approved.*—The practice of taking a non-suit on sustaining a demurrer to the complaint in the court below, and appealing from the judgment on demurrer to this court, and here moving to set aside the non-suit, is not approved. By such a ruling in the court below, the complainant is not compelled to take a non-suit.
2. *Marion, town of; power of under charter to license retail liquor dealer.*—The town of Marion, in Perry county in this State, is authorized by its act of incorporation and its by-laws to require a person proposing to sell spirituous liquors by retail in the limits of said town, to purchase a license from the corporate authorities for the same, although he has obtained a State and county license; and moneys paid for such license, although paid under protest, can not be recovered back, in an action of debt or assumpsit against said corporation.—13 Ala. 341, 343; Pamph. Acts 1869-70, pp. 110-17, § 16.

APPEAL from the Circuit Court of Perry.

Tried before Hon. J. Q. Smith.

The appellant brought this action against the appellee (the Mayor and City Council of Marion) to recover amounts paid by him, under protest, to the corporate authorities of Marion for a license to carry on the business of retailing spirituous and vinous liquors within the corporate limits of the town of Marion.

The *gravamen* of the complaint was, that appellant paid for and took out, on the 3d day of January, 1870, "a license to retail spirituous liquors, from both the State and county," authorizing him to carry on his business as a retail dealer in spirituous liquors, at Marion, Ala., from January 1st, 1870, to 31st December, 1870; that on the 16th of February, 1870, the general assembly incorporated said town under the name and style of the Mayor and Council of Marion; that said mayor and council, under and by virtue

Welch v. Mayor and Council of Marion.

their charter, passed an ordinance requiring every person, before entering on said business of retailing liquors, &c., to pay thirty dollars a month into the corporate treasury for license, &c. Demands being made upon appellant by the proper officer, he, "protesting each time against the right of the said mayor and city council to require of him a license," &c., paid sums amounting in the aggregate to the amount sued for, for a license to carry on his business in the corporate limits

Nothing is said in the complaint as to the existence of any corporation at Marion before the act of the general assembly of February 16th, 1870.

The court sustained the demurrer to the complaint, and plaintiff took a non-suit with bill of exceptions, with leave to move to set aside the same in the supreme court.

J. C. REID, for appellant.

LAWSON & BRAGG, *contra*.

PETERS, J.—The practice of taking an appeal from an order of non-suit taken in consequence of rulings on the pleadings, has been recently condemned by this court as inadmissible under our statute. The decision on the demurrer can not be reviewed on appeal in this way.—*Darden v. James*, January term, 1872, and authorities there cited. There might have been a judgment final on the demurrer, if the plaintiff failed or refused to plead over, and from this judgment an appeal might have been taken to this court. The above decision necessitates the affirmance of the judgment in this case; and this opinion might end here. But the deep interest felt in the cause by the learned counsel for the appellant, and the apparent novelty of the question raised in the arguments, will serve as an excuse for a brief discussion of the whole case upon the merits.

No question is more thoroughly well settled, by a long series of decisions of this court, than that of the power of a town or city corporation in this State to license and regulate the sale of spirituous liquors within its corporate limits; provided there is a sufficient legislative grant for this

purpose contained in the act of incorporation, and the mode of regulation is not in conflict with the law and Constitution of this State, or the Constitution of the Union. And so far as I know the latter instrument does not in any way interfere with the power of the State to grant licenses or control its town or city corporations.—*Dorman v. The State*, 34 Ala. 216; *Osborne v. Mayor, &c., of Mobile*, 44 Ala. 493; *Mayor, &c., v. Yuille*, 3 Ala. 137; *Intendant, &c., v. Chandler*, 6 Ala. 899; *Intendant, &c., v. Mullins & Barfield*, 13 Ala. 341; *Carroll et al. v. Mayor, &c., of Tuscaloosa*, 12 Ala. 173. In this case, the act of incorporation very clearly confers “the power and authority” upon the town corporation “to license and regulate retailing of liquors within the corporate limits.” This is the language of the general assembly used in the grant of the franchise.—Pamph. Acts 1869–70, pp. 110–17, § 16, No. 127. So far, then, as appears from the law referred to in the complaint, the power to exact the additional license existed, and the act was not unconstitutional and void. It is not alleged that the license from the State was exclusive of any other license, or that the license from the county had this effect. The possession of the State and the county licenses did not necessarily limit or supersede the powers of the corporation, or preclude it from requiring a license also. All these rights to demand the separate licenses could subsist in harmony together. In the case of the *Intendant of Greensboro v. Mullins*, *supra*, Chief-Justice COLLIER declares, as the judgment of the court, that, “as a municipal regulation, it is competent for an incorporated town or city, when authorized by its charter, to require one who is licensed to retail spirituous liquors by the county court to purchase from the corporate authorities the *privilege* of retailing within its limits.”—13 Ala. 341, 343; 6 Ala. 899.

The license, then, is a mere “privilege,” and not a “contract,” in the constitutional sense of this latter term. Nor can it be regarded as a “tax,” strictly speaking. This latter is a peremptory charge for the public use, which a party must pay whether he will or not, if he is able. A license is a matter of favor or election, which the party seeking to

Welch v. Mayor and Council of Marion.

use it may decline, if he will.—*In re Mayor, &c., of New York*, 11 John. 77; 6 John. 92; 13 Ala. 343, *supra*. Its whole extent is, to save the possessor harmless from the penalty of a violation of the law, which would otherwise occur from the same act, without the license.—*Brent v. The State*, 43 Ala. 297. Besides, it is taken and held, as any other mere privilege, under all the limitations which the legislature had established at the time of its acceptance, or which may be legally established afterwards. The whole system of the laws of the State must be taken together. A license under one statute is to be held under the limitations imposed by the whole body of the statutory code, unless the law under which the license is granted shows an exception. There is nothing of this sort shown in this case. It is known to this court, as a part of the law of the land, that Marion has long been an incorporated town, and that such incorporation existed at the date of the licenses referred to in appellant's complaint in the court below.—6 Ala. 899, *supra*; Acts Gen. Assembly of Ala. 1834–35, pp. 58, 59; also, Acts 1843–44, p. 57. The charter of February 16, 1870, was but a continuation of the corporate powers of the same town within its former limits. There was no interregnum between the two municipal governments, under the old charter and the new one. The fact that the license was demanded and issued under the new corporation makes no difference. The appellant, when he sought to locate his retail establishment at Marion, did so with a full knowledge of the consequences of the limitations by which the place was liable to be surrounded. If his seat turned out to be less comfortable than he hoped, it was by his own election. He brought with him what was unwelcome to his neighbors, and they have exercised their right to regulate and restrain it, as their corporate powers authorized them to do, by their license. And I am reluctant to believe that the general assembly intended to to interfere with their right in any way, by any general law outside of the act of incorporation itself, whatever might be the date of the act of incorporation. In this phase of its presentation, the appellant's case also clearly fails.

Besides, it does not appear that there was any fraud, any mistake of the facts, or any legal force that compelled the appellant to pay the money sought to be recovered to the town corporation. It was, then, a voluntary payment, under a full knowledge of all the facts. The mere protest, without legal compulsion, does not rescue such a payment from the character of a voluntary payment. Such a payment can not be recovered back.—*Rutherford v. McIvor*, 22 Ala. 750, 756. The demurrer was properly sustained, and the judgment of the court below is free from error.

Therefore, the judgment of the court below is affirmed.

WARE & WILSON vs. WARWICK.

[UNLAWFUL DETAINER.]

1. *Misjoinder of parties plaintiff; what is, in unlawful detainer.*—Where a complaint in unlawful detainer by two plaintiffs, seeking the recovery of the whole premises detained by a defendant, showed that the two plaintiffs were *each* separately in possession of the tract of land; that each separately rented his undivided interest in the lands to the same defendant, but at different times and upon different terms; that the terms of each lease had expired, and that each plaintiff had separately demanded possession of the undivided interest which he had rented to the defendant, and that the defendant refused to deliver possession after such demands,—*Held*, that it was bad, on demurrer, for misjoinder of parties plaintiff.

APPEAL from the Circuit Court of Talladega.

Tried before Hon. CHARLES PELHAM.

Horace Ware and Benjamin Wilson brought their action of unlawful detainer against John F. Warwick to recover possession of lands mentioned in the complaint. The justice of the peace before whom the suit was brought rendered judgment against the defendant, who appealed to the circuit court. In that court the defendant demurred to the

plaintiffs' complaint, for misjoinder of parties plaintiff; the court sustained the demurrer, and the plaintiffs declining to amend or plead over, judgment was rendered against them for costs, &c.; and hence this appeal.

The complaint alleged, in substance, that on the first day of January, 1870, the said plaintiffs were each in possession of an undivided half interest in the land and appurtenances described in the complaint; that on the 2d of January, A. D. 1872, Wilson rented his interest to the defendant at fifty dollars *per month*, revokable at the option of either at the end of any month; that Ware, being so in possession, on the 10th of May, 1870, rented his undivided half of said land to said Warwick for the sum of sixty dollars per month, revokable on notice being given from either party. On the 2d day of June, 1870, Wilson's contract of rent was revoked, and on the 10th day of June, 1870, Ware's contract of rent was revoked. After this, each party demanded his possession of Warwick, who was in possession under his contracts of renting, and it was refused; and thereupon the plaintiffs brought this suit to recover possession of the land.

TAUL BRADFORD, for appellant.

LEWIS E. PARSONS, *contra*.

PETERS, J.—This action is not freed from the rules of law which govern pleadings in other cases.—30 Ala. 572. The statute describes unlawful detainer to be, “where one who has lawfully entered into possession of lands or tenements, after the termination of his possessory interest refuses, on demand in writing, to deliver the possession thereof to any one lawfully entitled thereto, his agent or attorney.”—Rev. Code, § 3300. This shows that the party who brings the suit must be the party “lawfully entitled to possession.” And upon judgment in his favor, the court must render “judgment with costs, upon which he must issue a writ of execution, commanding the sheriff to restore the plaintiff to the possession of his lands and tenements, according to the complaint.”—Revised Code, § 3305. The

complaint does not show a joint possession, but only a tenancy in common before severance. Such a possession only vests each tenant with a right of restitution of his own possessory interest. This is an interest separate and distinct from the right of the co-tenant. The two are not the same.—Revised Code, § 1582. In such a case, the detainer may be from one tenant, while the other is left in quiet possession of his interest. The contracts of renting show that each party dealt separately with his own possessory interest. When this is so, the damages might be different.—Rev. Code, § 3312. It might also happen that under one lease this remedy would be barred, when at the same time it would be good under the other.—Rev. Code, § 3308. The same pleas could not answer the same complaint, and two judgments would have to be given on the same demand, and these judgments would have to be separate, not only as to the defendant, but as to the plaintiffs also. Wilson could not recover for damages done to Ware's possession, nor Ware for damages done to Wilson's possession. And there could be no joint damages, as the injury is not alleged to have accrued from a joint detention. The complaint does not show such a possession, as the plaintiffs have a right both jointly to be restored to it. Two causes of action are joined in one suit. Each plaintiff is entitled to recover his own possession, but no more. When both can not recover, it is a misjoinder.—Gould. Pl. ch. 4, § 98; Archb. Civ. Pl. 61; 1 Chit. Pl. 188; *ib.* 13, 44, 66, 86, 205; 1 Tidd. Pr. 11, 12, 13, 14, (marg.) and cases there cited. There was, then, no error in sustaining the demurrers by the judgment of the court below.

The judgment of the court below is affirmed.

CARROLL *vs.* POWELL, Ex'r.

[ACTION TO RECOVER AMOUNT BID AT EXECUTOR'S SALE OF LAND, &C.]

1. *Statute of frauds; what sale within.*—A sale of lands at public auction, by one claiming to sell as executor, under a power in the will of his testator, is within the statute of frauds.
2. *Same; what not sufficient written memorandum under section 1863 of the Revised Code to take sale out of statute of frauds.*—A written memorandum of such a sale, in the words and figures following, to-wit: "Sale bill of the estate of John Anderson, deceased, March 14th, 1868. 80 acres of land, east half of the southeast quarter of section twenty-four, township eleven, range six, bought by A. Carroll, at \$400," is not a sufficient memorandum under section 1863 of the Revised Code, to take the sale out of the statute of frauds.
3. *Same; defects of memorandum, how can not be cured.*—The defects of such a memorandum can not be cured by oral evidence.
4. *Same; plea of statute of frauds; what replication to, bad.*—A replication to a plea of the statute of frauds, that the defendant went into the possession of the lands under the contract of sale, and continued to hold the possession up to, and at the commencement of the suit, claiming to own the same, under and by virtue of said contract, is bad on demurrer.

APPEAL from the Circuit Court of Cherokee.

Tried before Hon. W. L. WHITLOCK.

This was an action brought by Powell, as executor of the last will and testament of John Anderson, deceased, to recover of Carroll the amount bid by him for certain lands of appellee's testator, sold by appellee at public outcry.

The complaint was as follows: "The plaintiff, who sues as executor of the last will of John Anderson, deceased, claims of the defendant four hundred dollars due as the purchase-money of eighty acres of land, more or less, known as the east half of the southeast quarter section 24, township 11, range 6, which was sold on the 14th day of March, 1868, by the plaintiff as executor, offered as the property belonging to the estate of testator, to the highest bidder, for cash. The same was knocked off to said de-

fendant, who was the highest and best bidder, at his bid of four hundred dollars as aforesaid, with interest thereon."

The appellant pleaded, in short by consent, 1st, non-assumpsit; 2d, payment; 3d, the statute of frauds; and, 4th, several pleas of set-off.

Demurrers were sustained to the pleas of set-off. The plaintiff took issue on the pleas of non-assumpsit, payment, and the statute of frauds; and also replied specially to the plea of the statute of frauds, "that the defendant went into possession of the land under the sale, and was still in possession of the same, claiming under the sale." To this replication defendant demurred, on the ground, among others, that it did not allege that the purchase-money, or any portion thereof, had been paid. The court overruled the demurrer, and the defendant took issue on said replication, and the cause proceeded to trial on the issues thus joined.

There were several objections reserved by defendant on the trial in regard to the admission of evidence in regard to the probate of the will of appellee's testator, the letters testamentary, and other matters. It is unnecessary, however, to allude to these objections more particularly, or to the ruling of the court upon the pleas of set-off, as they did not affect the decision of the cause and are not material to a proper understanding of the points decided.

But two witnesses were examined, and both on behalf of the plaintiff. The bill of exceptions shows that, after proving the death of Anderson, the probate of his will, the grant of letters to the plaintiff, and his qualification, &c., the plaintiff was placed on the stand as a witness in his own behalf. He testified that "he, as executor, advertised and sold the premises mentioned on the 14th day of March, 1868, at public outcry; that defendant became the purchaser at the price of four hundred dollars; that the terms of the sale were cash; that G. W. Potter acted as auctioneer and cried the land off, and the witness acted as clerk; that the sale was on the premises. The witness then produced a written memorandum of sale, as follows:

'Sale bill of the estate of John Anderson, deceased, March 14th, 1868. 80 acres of land, east half of the southeast quarter of section twenty-four, township eleven, range six. Bought by A. Carroll at \$400;' which the plaintiff's attorney offered to introduce to the jury as evidence. The defendant objected on the ground that it was insufficient to take the sale out of the statute of frauds, and was illegal and irrelevant. The court overruled the objection and allowed the said memorandum to be read to the jury as evidence, and defendant excepted. The plaintiff's attorney did not propose to connect said memorandum with any other writing made at the same time and place, or with any writing whatever; and did not afterwards introduce any such written evidence during the trial. The plaintiff further testified that the land sold was the same as that described in the complaint, and was situated in Etowah county; that he never sold land to the defendant but the one time. On cross-examination, plaintiff testified that he made this memorandum on the 14th day of March, 1868; that before he made it, he went home, some two or three hundred yards from place of sale; and that two hours elapsed after the sale before he made the memorandum. The defendant was not present when the memorandum was made; neither was said Potter.

"The plaintiff introduced one Anderson, who testified that he knew the land and its location; that the defendant was in possession; that he went into possession 1st June, 1868. Witness rented said land from defendant, and is still in possession as the tenant of defendant. On cross-examination, the witness testified he did not know how the defendant got into possession; plaintiff was not present when the defendant took possession. The witness further testified, that he was present at the sale; that Potter cried the sale. The defendant made but the one bid for the land; no other bid was made."

The defendant requested the court to give eleven written charges, all of which charges, except the ninth, were refused. The following charges, among those asked, were refused, and to the refusal defendant duly excepted:

"2d. The memorandum offered in evidence is not sufficient to take the sale out of the statute of frauds.

"7th. That if the jury believe from the evidence that Mr. Powell made the memorandum as executor, and of his own accord, and not as the clerk or agent of Mr. Potter, the auctioneer, then it is not sufficient to take the case out of the statute.

"8th. That before the jury can find that Powell was the agent or clerk of Potter to make the memorandum, they must be satisfied from the evidence that Potter requested Powell to act as his (Potter's) clerk or agent.

"10th. The terms of a sale are the conditions on which the property is sold, and if the property is sold for cash, it is as much a term of the sale as if the property, if sold on a credit, would be a term of the sale; and if property is sold for cash, it is essential to set this term out in the memorandum expressly."

The various rulings to which exception was reserved are now assigned as error.

McCONNELL & SAVAGE, and JAMES AIKEN, for appellant.
FOSTER & FORNEY, and COOPER & REEVES, *contra*.

PECK, C. J.—The only questions which will be considered in this opinion are those arising on the plea of the statute of frauds. The view we take of this statute renders necessary the reversal of the judgment, and will probably be decisive of the case on another trial.

The sale set out in the complaint is undoubtedly within the statute of frauds, and void, unless it is withdrawn from the influence of the statute by the evidence of the plaintiff. This the plaintiff does not deny, but insists that the evidence is sufficient for that purpose. Before examining this evidence, the demurrer of defendant to the plaintiff's special replication to the plea of the statute of frauds should be disposed of. In doing this, it is enough to say, the said demurrer was improperly overruled. The fact that defendant went into possession of the land mentioned in the complaint, as stated in said replication, and continued to hold

Carroll v. Powell, Ex'r.

the same up to the commencement of the suit, claiming to own said land under said sale, was no answer to said plea. The statute requires *the purchase-money*, or a portion thereof, to be paid, and that the purchaser be put in possession of the land by the seller; otherwise the sale is void.—Rev. Code, § 1862. Neither of these is sufficient of itself; both are required by the statute, and one is as necessary as the other.

We will now proceed to examine the plaintiff's evidence to avoid the plea of the statute of frauds.

This evidence consists of the oral examination of the plaintiff as a witness in his own behalf, and a written memorandum, in the words and figures following, to-wit: "Sale bill of the estate of John Anderson, deceased, March 14th, 1868. 80 acres of land, east half of the southeast quarter of section twenty-four, township eleven, range six. Bought by A. Carroll at \$400." Section 1863 of the Revised Code says: "When goods, or things in action, are sold, or lands, tenements or hereditaments sold or leased at public auction, and the auctioneer, his clerk or agent, makes a memorandum of the property, and price thereof at which it is sold or leased, the terms of sale, the name of the purchaser, or lessee, and the name of the person on whose account the sale or lease is made, such memorandum is a note of the contract, within the meaning of the preceding section." The foregoing memorandum by no means complies with what is required by said section.

1. It is not signed, nor does it otherwise appear that it was made by the auctioneer, his clerk or agent; but, on the contrary, the oral evidence of the plaintiff, if admissible and competent for that purpose, shows it was made by neither, but was made by the plaintiff himself. True, he says he acted as clerk; he does not, however, say he acted as the clerk of the auctioneer, or that he was appointed by the auctioneer to do so. His whole evidence, taken together, shows that he assumed to act as clerk of his own motion, without any appointment or authority of the auctioneer for that purpose.

If said memorandum was sufficient in form, and was signed by the plaintiff, it would not bind the defendant, without his assent, nor would it take the sale out of the influence of the statute.—*Hutton v. Williams*, 35 Ala. 503.

2. It does not state "the name of the person on whose account the sale was made." It begins, "Sale bill of the estate of John Anderson, deceased;" but this gives us no information on this subject. It does not inform us whether the sale was made on the account of an executor or administrator of the deceased, or whether it was made on the account of some person to whom the land was devised to be sold, or by some mortgagee or trustee, under a mortgage or deed of trust, made by the deceased in his life-time. For aught that appears by the memorandum, it may have been made on the account of some one, or either of such persons; certain, it is, it does not state the sale was made on the account of the plaintiff, as executor of said deceased.

3. It does not state the terms of the sale, whether for cash or on credit. It is, however, insisted by appellee's counsel, that as it is not stated whether the sale was for cash or on credit, the law presumes it was for cash. Admit this to be true, in ordinary sales, it does not, in cases like the present, answer the requirements of the statute. The statute requires the terms of the sale to be stated as a part of the memorandum. If the terms of the sale, or of any one of them, depend upon inference, or stand upon a legal presumption, such inference or presumption may be rebutted by oral evidence. This would leave the terms of the sale uncertain, and to be determined by the evidence of witnesses, and thus the doors to frauds and perjuries would be opened which the statute intended to close.—*Knox v. King*, 36 Ala. R. 367; *Adams v. McMillan, Ex'r*, 7 Por. 73. This latter case is, in many respects, very like the present. The sale was of lands, made at public auction by an executor claiming to sell under a power in the will of his testator. The defense was the statute of frauds, and the question was, the sufficiency of the memorandum

Ex parte Dennis.

made to take the case out of the statute. Judge ORMOND, delivering the opinion of the court, says: "It is now settled that a writing, no matter what may be its particular form, will be a sufficient memorandum, or note in writing, as required by the statute; provided, it contain the essential terms of the contract, expressed with such certainty that they may be understood from the instrument itself, or from some other writing to which it refers, without recourse to parol proof, and be signed by the party to be charged thereby." From this case we see that a defective memorandum can not be helped out by parol proof; and as no written evidence was offered in this case, for the purpose of aiding the memorandum, the court improperly permitted the same to be read to the jury, against the defendant's objection.

After the evidence was closed, it being all set out in the bill of exceptions, the defendant asked the court to give several written charges, numbered from one to eleven, all of which, except the ninth, were refused. We think the 2d, 7th, 8th, and 10th charges should have been given. They have reference to the written memorandum, and are in harmony with the view we have taken of it.

Let the judgment be reversed, and the cause remanded for another trial. The appellee will pay the costs.

EX PARTE DENNIS.

[APPLICATION FOR MANDAMUS.]

1. *Change of venue in criminal case; how often can be allowed.*—The trial of a person charged with an indictable offense can be removed but once from one county to another.
2. *Agreement of counsel to change venue; effect of.*—An agreement between the attorneys for the defendant and the counsel for the prosecution, that such a trial may be returned to the county from which it was removed,

Ex parte Dennis.

presents no legal reason for demanding such return, and an application for *mandamus* to compel the court in which the indictment is pending to return the trial of the cause to the court from which it was removed, will be denied.

This was an application for a *mandamus* to compel the circuit court of Autauga to make appropriate orders to return the case of the State of Alabama *v.* W. E. Dennis, and the trial thereof, on an indictment against said Dennis for an assault with intent to murder, to the city court of Montgomery.

The indictment was returned and filed originally in the city court of Montgomery, and after the case had been once or twice continued, the venue was changed, on Dennis' application, to the circuit court of Autauga.

At the fall term, 1871, of the circuit court of Autauga, as appears from the bill of exceptions, as soon as the case was called for trial and before any other step in the cause was taken, the defendant *in propria persona*, in open court, proved the execution of an agreement, which, after naming the case, &c., was as follows :

"In the above case, it is agreed between the counsel for the State and the defendant that the venue and trial of said case is to be changed from Autauga circuit court to the city court for Montgomery county, and that the trial of the case is not to take place until the February term, 1872, of said city court, unless with the consent of both parties."

"October 7th, 1871.

STONE & CLOPTON,

"Attorneys for prosecutor and State.

"SAM'L F. RICE,

"Attorney for said Dennis."

And defendant further proved, in support of the motion hereinafter stated, that Messrs. Stone & Clopton, whose names are signed to said agreement, did, at the last term of the court, represent the State of Alabama in the prosecution of this case, and that their names appeared at the last term of this court, and now appear on the docket of this court, as attorneys for the State of Alabama; and that

Ex parte Dennis.

in fact, at the last term of this court, a trial of this case was had, and the said Stone & Clopton and James H. Clanton, who was then a member of the firm of Stone, Clopton & Clanton, appeared for and represented the State of Alabama on the trial of said case.

It was further in proof, that after the making of said agreement, but after the defendant had been informed by telegraph of the same, that Mr. Clopton, at the instance of the prosecutor, desired to rescind said agreement, but the defendant, through his counsel, refused to rescind.

It was also proven to the court, that the solicitor of this county, Jesse H. Booth, was not consulted at the making of the said agreement, and that he was not informed thereof until the day before this motion was made; and that he did not assent to said agreement, but dissented from said agreement in open court, and opposed the same on this motion.

It was also shown, that the prosecutor and all the witnesses for the State reside in the county of Montgomery.

Upon the foregoing facts, which, with the record of the case itself, was all the evidence introduced, Dennis, by his attorneys, moved to have said agreement entered of record, and to have the cause sent back to the city court of Montgomery. The court refused to grant either motion, and the defendant excepted.

WATTS & TROY, and RICE, JONES & WILEY, pro motion.

ARRINGTON & GRAHAM, *contra*.—The solicitor of the county of Autauga was never consulted about the change of venue, and he dissented from the agreement in open court at the time the motion was made.

“In a Massachusetts case it was laid down, that the counsel who assists the prosecuting officer is not to exercise any control over the cause; and we may accept this as the general doctrine.”—1 Bish. Crim. Pro. § 999; see, also, Bish. Crim. Pro. § 989, *et seq.*; *Commonwealth v. Williams*, 2 Cush. 582; Wharton’s Cr. L. 174, 900, and note *T*.

Even had the assistant counsel adhered to the agreement which he signed, for a change back to the city court, the change could not have been made without the concurrence of the law officer of the State. The reasons for investing a sworn officer of the State with exclusive control of criminal prosecutions, are obvious.

To change the venue the second time is forbidden by the plain terms of the statute.—Rev. Code, § 4207. The only mode by which the venue of a criminal case can be changed, is prescribed by our statutes.—Rev. Code, § 4206.

An order to change the venue the second time, and the withdrawal of the case from the docket of the circuit court for that purpose, would be equivalent to a dismissal of the prosecution, or the entering of a *nolle prosequi*.—*Drinkard v. The State*, 20 Ala. Rep. 9; *Ex parte Rivers*, 40 Ala. Rep. 712.

B. F. SAFFOLD, J.—Section 4206 of the Revised Code prescribes the causes for which a case of this sort may be transferred to another county, and directs the manner in which it shall be done. Under it this case has been removed from the county where it originated. Section 4207 declares that the trial can be removed but once.

We have no authority to hold, that the agreement of counsel to that effect is a ground for the change of venue in a criminal case.

The *mandamus* is refused.

STRAWBRIDGE *vs.* THE STATE.

[MOTION TO ESTABLISH* BILL OF EXCEPTIONS IN SUPREME COURT.]

1. *Bill of exceptions ; when judge not bound to sign.*—A judge is not bound to sign a bill of exceptions reserved and tendered in the court below, unless it contains “the point, charge, opinion, or decision, wherein the court is supposed to err, with such a statement of the facts as is necessary to make it intelligible.”—Rev. Code, § 2755.
2. *Same ; what bill too imperfect to be established.*—A bill of exceptions is imperfect and insufficient if it merely refers to a charge without inserting it. The direction, “*here insert it,*” or “*here set out the charge,*” does not make the charge or other document thus referred to a part of it. And such an imperfect bill of exceptions can not be established in this court, by the Code.—Rev. Code, § 2758.

This was a motion to establish a bill of exceptions.

The motion and affidavits accompanying it show that the petitioner was convicted of betting at a game called keno, and at the same term of the court his attorney presented to the presiding judge of the court the identical bill of exceptions now sought to be established ; that the bill of exceptions thus presented “truly and correctly set forth the facts,” and was in “every particular correct, and correctly stated the facts and exceptions as they occurred on the the trial of the cause.” It further appears, that the clerk endorsed on said bill, “Filed April the 20th, 1872,” and that the judge endorsed on the bill, “Refused on account of the incorrectness of the bill. Geo. H. Craig, judge,” &c.

When this last endorsement was made does not appear, but the motion states that the petitioner knew nothing of it until after the original bill of exceptions, as altered and revised and signed by the presiding judge, had been copied into the transcript and filed in this court. The petitioner further states, that the time when the corrections and alterations were made was not known to him, but that the alterations and corrections thus made in the bill when

signed and allowed were made some time after the aforesaid endorsement by the judge. It is further alleged, that the bill of exceptions, as it appears in the transcript, (after being corrected and altered by the presiding judge,) is incorrect, and does not fairly present the exceptions reserved by the petitioner.

The original bill of exceptions is made an exhibit to the motion. It appears from it that the bill now sought to be established was not complete. Reference is made in it to subdivision 46 of section 99 of third article of code of by-laws adopted by the mayor and counsel of the city of Selma, which the bill recits "are as follows: [Here set out sections and sub-sections of city Code,] together with a receipt or license issued by said city clerk, which is as follows: [Here set out license]." In other parts of it, the bill recites that "the court charged the jury as follows: [Here insert the charge]." In another part it states, the defendant requested the court to give "the charges numbered from one to eight in writing, and the court refused to give charges Nos. 2 and 5, [Here set out the charges refused,] and defendant excepted."

Accompanying the motion is an affidavit of J. N. Haney, esq., attorney for motion, that the facts therein stated are true. Also, affidavits of G. W. Gayle, esq., an attorney of the court, and R. B. Thomas, clerk of the court, H. W. Quartemus, J. V. Ackerman, J. L. Wren, and W. S. Strawbridge, stating, in substance, that the affiants were present, heard what occurred during the trial, and that the original bill, as presented to the presiding judge, correctly and truly set forth the evidence, and the exceptions reserved, on said trial.

No counter affidavits were filed.

JASPER N. HANEY, pro motion.

ATTORNEY-GENERAL, *contra*.

PETERS, J.—This is an application to prove a bill of exceptions, on motion in this court, which the presiding judge in the court below refused or failed to sign.

The statute in such case declares, that "if the judge fail or refuse to sign a bill of exceptions, the point or decision and the facts being truly stated, he is guilty of a high misdemeanor in office, and the supreme court must receive such evidence of the facts as may be deemed by it satisfactory, and proceed to hear the cause as if the bill had been signed by the court."—Rev. Code, § 2758. The document presented in this court as the bill of exceptions reserved and tendered to the presiding judge for his signature, is established by evidence "deemed satisfactory" in this court. But it appears, from inspection of this document, that it refers to a certain license and several charges of the court which are not set out in full. Such a bill of exceptions is an insufficient statement of the facts required in such a document. For this reason, the judge was not bound to sign it. A reference in a bill of exceptions to a charge, with the words, "here set out the charge," or "here insert it," does not make the charge thus referred to a part of the bill of exceptions.—*Bradley v. Andrews*, 30 Ala. 80; *Stodder v. Grant*, 28 Ala. 416; *Br. Bk. v. Moseley*, 19 Ala. 222; *Quigley v. Campbell*, 12 Ala. 58; *Looney v. Bush*, Minor, 413. And the court is not bound to sign any such incomplete statement of the facts as a proper bill of exceptions.—Rev. Code, §§ 2755, 2756, 2758. In *Carlington v. Jones*, this court refused to establish such an imperfect bill of exceptions.—37 Ala. 240. We think this was a proper construction of the statute.

The motion is therefore refused, with costs.

YERBY, COUNTY SUP'T, vs. SEXTON ET AL.

[ACTION BY COUNTY SUPERINTENDENT OF EDUCATION TO COLLECT PROMISSORY NOTE, PAYABLE TO TRUSTEES OF SIXTEENTH SECTION SCHOOL FUND, AND SUCCESSORS, &C., GIVEN FOR MONEY LOANED, &C.]

1. *Township trustees, note payable to ; how collectable before adoption and inauguration of present educational system.*—Promissory notes payable to township trustees, or their successors in office, under the free public school system, for money loaned by them, that had accrued from the sale of the sixteenth section of their respective townships, might, before the inauguration of the present educational system, have been collected by said trustees, in their name as trustees, &c., for the use of schools and school purposes in said townships.
2. *Same ; who may sue to collect under present educational system and laws.*—Under the present educational system, such notes are required to be turned over to the county superintendent of education of the proper county, and, if necessary, may be collected by suit in his name as county superintendent, &c.
3. *"Party really interested ;" meaning of words as used in section 2523 of Revised Code.*—No fixed rule has been laid down, or probably can be, by which the meaning of the words, "the party really interested," as used in section 2523 of the Revised Code, can be certainly determined, as applicable to particular cases or to cases generally. Whether a party has, or has not, the legal title, if he is the party to whom payment can legally be made, and who can legally discharge the debtor, the action may be brought in his name, although the money, when collected, is not for his use, but is for the use of some other person or persons, to whose use he is required to apply it, or to whom he is bound to pay it.

APPEAL from the Circuit Court of Hale.

Tried before Hon. L. R. SMITH.

The complaint in this case was as follows :

"M. H. Yerby, county sup't of Hale county, v. L. L. Sexton, J. K. Elliott, Pinkney Jones.

"The plaintiff, as county superintendent of Hale county, Alabama, claims of the defendants three hundred dollars, with interest, due by promissory note made by them on the 25th day of October, 1859, and payable twelve months

Yerby, County Sup't, v. Sexton et al.

after date, to the trustees of the sixteenth section school fund in township 22, range 4, east, in said county; said note has been transferred to plaintiff by said trustees, in accordance with an act of the legislature approved August 11th, 1868. Said note was given for the loan of moneys arising from the sale of the lands of the sixteenth section in said township 22, and this suit brought at the instance of the trustees of said township."

The defendants craved oyer of said note, which was read to them, as follows:

"\$300. Twelve months after date, we or either of us, promise to pay to the trustees of the school fund in township 22, range 4, east, or their successors in office, the sum of three hundred dollars, with interest annually from date. October 25th, 1859. (Signed)

"L. L. SEXTON,

"JO. K. ELLIOTT,

"P. JONES."

Said note is thus endorsed on the back thereof:

"Transferred the within note to M. H. Yerby, county superintendent for Hale county, in accordance with the act of the legislature of Alabama, approved August 11, 1868. This 4th day of August, 1869.

"(Signed)

B. HOLBROOK, for

"B. HOLBROOK,

"J. G. WILLIAMS,

"S. HENRY,

"Trustees."

The defendants then demurred to the complaint, on the following grounds:

"1. Because, by the said complaint the said plaintiff alleges and shows that the said note was, and still is, the property of a corporation, known and described as township 22 of range 4, east, created by the laws of Alabama, capable of suing and being sued in its corporate capacity.

"2d. Because, the plaintiff by his said complaint shows that the note upon which this suit is founded was, and is, the property of the school corporation known as township

22, range 4, east; and that said corporation, and not the plaintiff, is the party really interested in said note; wherefore, they pray judgment of the court.

"3d. Because, the said complaint shows that said trustees have no authority, by the act recited, to transfer, by indorsement or otherwise, the said note to the said plaintiff, as superintendent of Hale county; wherefore, they pray judgment, &c.

"And 4th. Because, the said plaintiff by his complaint fails to show any authority to institute said suit for and in behalf of the corporation to which said note belongs; wherefore, they pray judgment," &c.

The court sustained the demurrer, and the plaintiff declining to plead over, judgment was rendered against him, &c., and hence this appeal.

The counsel of the parties filed among the papers in the cause a written agreement, which, so far as the same is material, is as follows:

"In this cause, it is agreed between the counsel for appellant and appellees that the demurrers of the appellees, as set out in the record, shall put in issue the capacity of the appellant, in his own name, as county superintendent of Hale county, to bring and maintain the action on the note sued on in this case, as the party really interested in said note," &c.

The chief error assigned is, that the court below erred in sustaining the demurrer.

J. J. GARRETT, for appellant.—1. *Tompkins et al. v. Reynolds*, (17 Ala. 109,) *Moore & Jones, Adm'rs, v. Henderson*, (18 Ala. 232,) *Bryan et als. v. Wilson*, (27 Ala. 208,) and *Leonard v. Storrs*, (31 Ala. 488,) conclusively show that a party, other than the owner of a promissory note, may maintain an action thereon in his own name, under the provisions of the statute; and they settle conclusively that where there is a sole and exclusive right to receive the money due on the note, or a liability to account to the owner of the note for the money due thereon, there is such

Yerby, County Sup't, v. Sexton et al.

an interest in the party entitled to receive or liable to account, as will make him the party really interested within the meaning of section 2523.

2. The note sued on is not the property of the corporation known as "Township 22, Range 4, east."

If there be such a corporation, (and it is questionable whether, under the present school system, there are any such corporations as townships,) it exists by virtue of section 576 of the Revised Code. The capacity of townships, as corporations created by that section, to hold property, is expressly restricted by section 959 of the Revised Code to two acres of real estate and one thousand dollars worth of personal property. The corporation known as "Township 22, Range 4, east," never could have been the owner of the six hundred and forty acres of the sixteenth section in township 22, range 4, east; and if it could not be the owner of the sixteenth section, it was not, and is not, the owner of the money realized from its sale. Section 575 of the Revised Code, the one immediately preceding that by which the townships are incorporated, declares, that "all school lands are vested in the State, in trust to execute the objects of the grant." The school funds could not be vested in the State and at the same time in the corporations created by the incorporation of the townships. The State, through its legislature, might undoubtedly have endowed those corporations with capacity to hold the property and title in the whole of the lands of the sixteenth section; but it has not done so, and on the contrary has expressly limited that capacity to two acres, and this most probably for the simple purpose of a location for township school houses.

The relation which the State of Alabama sustains to the lands granted to the State for the use of schools, and to the school fund arising from the sale of those lands, is that of trustee to execute the purposes of the grant, with *full legislative power over the subject matter of the trust*. These powers have in fact no limit but the good faith of the State. Unlike other fiduciary agents, the will of this trustee, as expressed through its legislation, is the law of the admin-

Yerby, County Sup't, v. Sexton et al.

istration of the trust. The trustee is literally a "law to itself;" and within the scope of the purposes of the grant and its execution of them, it has no superior on earth.—*Mobile School Comm'rs v. Putnam*, 44 Ala.

The various acts which have been cited show a manifest intention in the legislature to constitute the county superintendent the sole and exclusive custodian of the local school funds in his county, and the act of August 11, 1858, gives him the exclusive right to receive *all* moneys, records, books, or other property, then in the hands of county superintendents, township trustees, or other school officers; and he has never been required to surrender them to any other custodian, but merely to report to the State superintendent the disposition he has made of the moneys so received. The act requiring them to be placed in his custody clearly looks to his responsibility for their proper management and safe keeping, by withholding them from his possession until he had given bond. When he had done so, no one else could legally have or hold possession of the property committed to his keeping by law; nor in the case of promissory notes or other debts, could any one else receive or enforce payment of them by suit. The trustees under the old system could not do this; for on the 11th August, 1868, all offices of county superintendents, township trustees, and school commissioners were declared vacant.—*School Acts 1868*, p. 15. The trustees under the new system could not do this, because, under the new system, they have nothing whatever to do with the school property. If they were to receive the money due on such notes, they might be compelled to turn it over to the county superintendent, by suit in his name, if necessary. The State superintendent of public instruction could not enforce the payment of such notes by suit or otherwise; because they are by law committed to the custody of another officer; and moreover, the state superintendent is prohibited by law from collecting money loaned out by the township trustees under authority of law. Further still, the interest upon such notes given for the purchase of sixteenth sections, except such as were deposited in the banks for

Yerby, County Sup't, v. Sexton et al.

collection, and by them turned over to the State superintendent under the act of February 6th, 1858, p. 309, was to be paid to the county superintendent, to be disbursed by him according to law. No one else could receive payment of this interest but the county superintendent, and he had a right, therefore, to sue in his own official capacity and name to recover it, if payment were withheld. By parity of reasoning, he would be entitled in the same way to recover the interest on notes given for the proceeds of the sales of the sixteenth section; and as in this case those notes were placed in the hands of the plaintiff by the law, he became solely and exclusively entitled to receive payment of both principal and interest, and responsible on his official bond for using all necessary means to collect the amount due thereon. Being thus constituted a receiver by the statute of August 11th, 1868, with the sole and exclusive right to receive the money due on the note sued on, the plaintiff was the *party really interested*, within the meaning of section 2523 of the Revised Code, no matter whether the note sued on was the property of the State of Alabama, or of township 22, range 4, east, and this action was properly brought in his name.—*Leonard v. Storrs*, 31 Ala. 488.

The board of education had full power to authorize the plaintiff to receive the note sued on from the school officers of the old system, and to manage and dispose of it according to their direction. The board have all the legislative powers exercised by the general assembly in regard to the old system. And it follows, that the plaintiff, who is the officer entitled under the new system to receive the note upon which this suit is brought, derives his right and authority in respect thereto, not from the officers of the obsolete school system who had been holding it, but from the board of education, which required him to receive and account for it. The plaintiff, therefore, need not attempt to show that they had a right to transfer the note to him. He need not attempt to show any authority from them to bring this suit, for they had none to confer.

W. & J. WEBB, *contra*.—1. If it appear from the complaint that the party plaintiff is not the party really interested, a demurrer will lie.—31 Ala. 404.

2. The act of August 11th, 1868, simply makes the county superintendent the “*custodian*” of books, &c., belonging to each “*county*.” It only intended to put in the hands of a bonded officer the books, moneys, &c., belonging to the *county*, not those belonging to the 16th section fund. This fund belongs to a body corporate known as “Township 22, Range 4, east,” created by section 576 of the Revised Code, and long before that, Clay’s Digest, 522, § 12. Such corporation may sue and be sued.—Revised Code, §§ 959, 960. The board of education, by their act, have re-adopted these sections of the Code.—See Acts of 1868, pp. 151–6.

3 The act of congress of March 22d, 1867, gives the proceeds of the sale of these lands “for the support of schools within the several townships,” &c., for which they were originally reserved and set apart, *and for no other purpose whatever*. It is provided in this act, that in the apportionment of the proceeds of this fund, each township, &c., shall be entitled to *such part thereof, and no more*, as shall have accrued from the money arising from the sale of lands belonging to *such township, &c.* By this act, the legal title to the fund in question was placed by the government of the United States (the grantor) in the State of Alabama as trustee, for the benefit of the inhabitants of each respective township.—4 Ala. 629–31.

4. Conceding to the board of education the fullest legislative power which can be claimed for it under the constitution, under the influence of the decision of the court in *Putnam v. Mobile School Commissioners*, in the administration, after they are collected, of all funds, from whatever source derived, for public institutions of learning and education in this State; yet, it can not be claimed that said board has any grant of legislative power, either to make or alter the laws of Alabama governing or directing the mode of *judicial proceedings* in Alabama in suits for the collection of money. Such is the purpose and nature of section 2523 of the Revised Code. Nor can it be successfully claimed

or maintained that the board of education has any legislative power to say or enact who are the (*"really"*) beneficially interested parties in funds arising from the proceeds of sale of sixteenth section school lands. That is fixed by the act of congress, which *is the supreme law* of the case, any thing to the contrary in the State constitution or State law notwithstanding. Thus, it has never been imagined that the board of education has any constitutional power to levy and assess the taxes which are appropriated by sections 11, 12 and 13 of article 11 of the constitution, but only to direct the administration of the funds *after* they have been collected in accordance with the revenue law enacted by the legislature for school purposes.

But the board of education has not enacted any law or laws subversive of the vested rights of the parties who took the beneficial interest in the fund in litigation under the act of congress of 2d March, 1827. On the contrary, it has re-enacted very nearly all, if not all, of the sections of the Code upon the subject of the proceeds of sale of sixteenth section lands.—See "Laws relating to the Public Schools of Alabama," p. 14, § 9, re-enacting section 604 of the Code requiring said notes to be taken payable to the "State of Alabama for the use of township 22, range 4." Again, on page 16, section 24, re-enacts section 428 of the Revised Code, and act of 1857-8, as to how matured notes for sale of sixteenth section lands shall be collected; and also section 428 of the Revised Code re-enacted, which directs that "all collections on said notes must be paid into the *treasury of the State*." So, also, section 428 of the Revised Code has been re-enacted by the board.—See p. 17; and see act of board of education re-enacting laws in the the Code, in School Acts of 1870, page 11; in "Hodgson's School Laws," p. 20.

And, as a further argument showing that the legislature still retains the power of legislating, and directing the manner of collecting the notes given for sixteenth section school lands, see Acts of 1870-71, p. 46; *ibid*, p. 52. The latter refers to and confirms the correctness of the law contained in sections 428 and 429 of the Revised Code, re-enacted

Yerby, County Sup't, v. Sexton et al.

by board of education, and which said sections were the law at the time of instituting this suit.

These acts of the legislature are persuasive to show two things—1st, that the legislature still holds and continues to exercise legislative power over the subject-matter of these funds, and of educational funds and officers; and, 2d, that it does not regard the constitutional provisions of article 11 as conferring power on the board of education to direct the mode or manner of collecting these funds.

The principle involved in the decision of this case is based on the jurisdiction of the chancery court over the settlement of copartnerships, and the administration of their assets for that purpose.

PECK, C. J.—The question presented by the argument to be decided by this court on the record in this case is, “the capacity of the plaintiff, in his own name, as county superintendent of Hale county, to bring and maintain the action, on the note sued on in this case, as the party really interested in said note.”

In doing this, the statements of the complaint are to be taken as admitted. 1st. That the note was given by the defendants, for moneys loaned to them by the trustees of the school fund of the township in said note named, called in section 577 of the Revised Code, trustees of free public schools, in said township.

2d. That the moneys so loaned were derived from the sale of the lands of the sixteenth section in said township.

3d. That the plaintiff is, and was, at the time said note was, as alleged, transferred to him and suit brought, county superintendent of education of Hale county.

And 4th. That the persons by whom the said moneys were loaned, and to whom the note was made payable, were trustees of said township, and that the persons by whom, as alleged, said note was transferred to plaintiff, were the township trustees of the township at the time of said transfer.

1. What are known as the sixteenth sections, by the act of congress of the 2d of March, 1819, entitled “An act to

Yerby, County Sup't, v. Sexton et al.

enable the people of Alabama Territory to form a Constitution and State Government, and for the admission of said State into the Union, on an equal footing with the the original States," and by the acceptance of the propositions contained in said act by the convention, for and on the behalf of the people of this State, signed at Huntsville, on the 2d day of August, in the year 1819, were granted to the inhabitants of the respective townships for "the use of schools." And by a subsequent act of congress of the 2d of March, 1827, entitled "An act to authorize the legislature of the State of Alabama to sell the lands heretofore appropriated for the use of schools in that State," the legislature of this State were authorized to sell and convey, in fee simple, the said lands, and to invest the moneys in some productive fund; the proceeds of which fund should be forever applied, under the direction of the legislature, for the use and support of schools within the several townships; but such sales could only be made with the consent of the inhabitants of the respective townships, to be obtained in such manner as the legislature might direct. And it is provided by said act, that in the apportionment of the proceeds of said fund, each township should be entitled to such part thereof, and no more, as might arise from the moneys derived from the sale of the school lands belonging to such township. Under the authority of this latter act of congress, this State has, from time to time, legislated upon this subject, authorizing the sale of said sixteenth sections, and providing the mode and manner of obtaining the consent of the inhabitants of the townships, and by whom and upon what terms the sales should be made; how the purchase-money should be secured, collected and invested, and in what way, and by what persons or officers, the proceeds should be appropriated to the use of schools in the several townships.

The only restraints or limitations on this legislative power are, that said sales should only be made with the consent of the inhabitants, and that the proceeds of the moneys derived from such sales should not be diverted to

any other purpose, but be faithfully applied to the use of schools in the respective townships.

It does not seem necessary, for the purposes of this opinion, to collate the many acts that have been passed by the legislature on this subject. As the law stood in Clay's Digest, the sense of the inhabitants, and the sales of 16th sections, were obtained and made by school commissioners of the several townships, and the notes of the purchasers were made payable to the president and directors of the State bank, or any branch thereof. The said bank and branches received said notes, and collected the same as other debts, according to the common course of law, and a payment at any other place was not deemed a good and valid payment.

Not only were these notes placed in said banks, but all moneys belonging to said sections that then were, or might be afterwards, received by said commissioners, were to be paid into said banks, and said banks were required to pay to said commissioners annually eight per cent. interest, and no more, upon the school funds deposited with them, which was to be applied by said commissioners to the use of schools in their respective townships.

Under the Code of 1852, *three school trustees* were elected in each township, and the office of school commissioners seems to have been abolished; and these trustees held elections to ascertain the sense of the townships as to the sale of sixteenth sections, and when a sale was voted, sold the same at public auction; and the notes for the purchase-money were made payable to the State of Alabama, and not to said banks, for the use of the particular township. These notes were to be deposited, by the judge of probate of the proper county, in the office of the State comptroller, and if not paid within six months after maturity, were to be placed in the hands of the attorney-general for collection; and the money, when collected, was paid to the treasurer of the State.

The governor, from time to time, issued to the several townships certificates of State stock, showing the amount received for each township, to bear interest from the first

Yerby, County Sup't, v. Sexton et al.

day of October of each year. This stock, after it was registered by the secretary of state, was transmitted to the probate judge of the proper county, copied by him in a book kept for that purpose, and then the original certificates were delivered by said judge to the trustees of the township, and the interest on this stock was paid to said trustees of the townships by the county treasurer, and by them applied to the use of schools in the several townships.

Then followed the acts of the 17th of February, 1854, the 14th of February, 1856, and of the 6th of February, 1858. The first of these acts is entitled "An act to establish and maintain a system of free public schools in Alabama;" the second, an act entitled "An act to render more efficient the system of free public schools in the State of Alabama;" the third is entitled "An act to provide for the transfer of all matters relating to the school funds, from the State bank and branches to the office of superintendent of education."

By the first of these acts, the administration of free public schools thereby established was committed to a superintendent of education for the State. Three commissioners of the public schools in each county, and three trustees of free public schools in each township. By the second of said acts, the three commissioners for each county were superseded by a county superintendent of free public schools in each county. By this latter act, the respective powers and duties of these officers are prescribed. Among other duties, the superintendent of education was to have and exercise a general supervision over all the educational interests of the State, and to prepare and preserve, in well bound official books, complete and particular exhibits of the condition of the public school fund of each township in every county of the State, specifically discriminating as to the portion derived from its sixteenth section fund, and from other sources; and to see to the faithful disbursement and application of all moneys set apart and appropriated by said act to the use of free public schools; and the comptroller, by said act, was directed to transfer to him all

books, documents, vouchers, bonds, notes, or other instruments appertaining to the school fund; and the interest upon all notes given for the purchase of sixteenth sections, except such as were deposited in the banks for collection, and the rents of such sixteenth sections as were leased, were to be paid to the county superintendent of the proper county, to be by him paid out according to the provisions of said act.

The several county superintendents were to have a general supervision of all free public schools in their several counties; to make a proper distribution among the trustees of free public schools in each township, in the manner by said act prescribed, of all funds that might be subject to their control for school purposes, and pay over the same promptly whenever called upon by said trustees to do so.

The said trustees in each township had, in like manner, the immediate supervision of the free public schools in their respective townships; the power to employ teachers; and they were required to faithfully disburse, in payment of teachers or for the legitimate purposes of said schools, all moneys which they might receive for such purposes.

By the act last above named, the act of the 6th of February, 1858, the commissioners and trustees of the State bank and branches were required to deliver to the superintendent of education all books, documents, notes, or other evidences of debt, relating to sixteenth section funds, that might be in possession of said bank or branches; and it was made his duty to collect all debts due to said bank or branches payable for the purchase of school lands, and for that purpose, he was invested with all the powers in reference thereto which had belonged to said bank and branches; and to pay over the moneys received from the collection of said notes to the treasurer of the State; but it was provided in said act that it should not interfere with, or empower the said superintendent to collect any moneys loaned out by the trustees of any township in this State, as theretofore authorized by law.

Here, we see that the superintendent of education was invested with all the powers to collect these notes, relating

Yerby, County Sup't, v. Sexton et al.

to sixteenth section funds, that had been possessed by said bank and branches. Said bank and branches made said collections, when necessary, by suits in their own names, and by the powers here given the said superintendent might have collected them by suits in his own name, as superintendent, &c. Now, as by said act of the 14th of February, 1856, all notes for the sale of sixteenth sections, under the Code of 1852, which were deposited with the comptroller, were, by said act, to be by said comptroller transferred to the superintendent of education, and he charged with the collection of the same, although said notes were made payable to the State of Alabama, for the use of the respective townships, we can see no good reason why they might not have been collected by suit in his name as superintendent. But as this question is not involved in this case, we decline to say any thing more definite about it, but leave it open for decision if it ever becomes necessary.

The note, the foundation of this action, is not a note given for the purchase-money on the sale of the sixteenth section of said township, but for money loaned by the trustees of said township, which had been derived from the sale of said sixteenth section; a note not payable to the State bank or any one of its branches, nor to the State of Alabama, but to the trustees of said township, or their successors in office. Although I have been unable to find any express provision authorizing such loans, yet we think the proviso to said act of the 6th of February, 1856, to say the least of it, is a clear negative authority for such loans; and before the adoption of the present constitution, and the school system inaugurated under its provisions, the said note might have been collected by suit in the name of the trustees of said township, or their successors in office. If the law permitted the loan to be made, but did not prescribe to whom the note should be payable, it was properly made payable to the trustees, or their successors in office, and they might have maintained an action upon it in their own name, as trustees, notwithstanding section 2523 of the Revised Code. Although the inhabitants of the township had a substantial interest in the money, they had no such

interest as would authorize a suit in their name under said section. The money could not, lawfully, be paid to, or be received by them, but should have been paid to said trustees, who were charged with the faithful disbursement of it, in the payment of teachers or other legitimate school purposes.

Said trustees had not only the legal title to said note, but were, within the meaning of said section, the parties really interested. What the words, "the party really interested," as used in said section, mean, I readily admit I do not very well understand; no rule, so far as I know, has been laid down by which their meaning, as applicable to particular cases, or to cases generally, can be certainly ascertained.

In ordinary cases, there is little difficulty. Where the dry, legal title is in one, and a clear, equitable title is in another, whether by transfer, delivery, or otherwise, to whom alone the money belongs, and who only is entitled to receive it, and authorized to discharge the debtor,—in such cases, there is no trouble; the action must be brought in the name of the equitable owner. He is, in the language of said section, the party really interested. But where the party having the legal title, is also the only party entitled to receive the money and discharge the debtor, although, when collected, he holds the money, not for his own use, but for the use of some other person or persons, and to whose use he is to apply it, or to whom he is bound to pay it,—in all such cases, the action must be in the name of the party having the legal title. For example, a person dies intestate; his creditors and his distributees are the persons really interested in his estate, but the legal title, especially as to the personalty, passes to, and vests in, his personal representatives, and they only at law can maintain an action to collect the debts due to the deceased; they only are entitled to receive the money, and they only can discharge the debtors. So, in the present case, before the adoption of the present constitution and inauguration of the present educational system, an action upon said note would, properly, have been in the name of the trustees of

said township, or their successors in office, although the money, when collected, would not have been for their use, but for the use of schools in said township; in other words, the inhabitants of said township, to whom the sixteenth section thereof was originally granted for the use of schools, would have been the parties really interested; and the present inhabitants are, now, the parties really interested in the money sought to be recovered by this action, but not in the sense in which said words are employed in said section, and I think it very clear, no action can be maintained upon it in their name.

It is earnestly and ably argued by defendant's counsel, that the complaint shows that said note was, and is, the property of a corporation known and described as "Township 22 of Range 4, east," created by the laws of Alabama, capable of suing and being sued in its corporate capacity. By section 502 of the Code of 1852, the inhabitants of each township in this State were incorporated, by the name of "Township —, in Range —," according to its number by the surveys of the United States. By section 822 of said Code, each township, in its corporate capacity, as created by said section 502, might hold real estate in their respective townships, not exceeding two acres, and personal property to the value of one thousand dollars. These corporations were created, manifestly, not to have the management of the sixteenth sections, or the control or disbursement of the funds to be derived from the leasing or sale of said sections, but for other purposes, to-wit: to hold the title to two acres of land, intended, no doubt, as a site for the school house of the township, and personal property, necessary and appurtenant thereto, not to exceed in value one thousand dollars. No action, therefore, could be prosecuted by said corporation for the recovery of said note, either as having the legal title, or as the party really interested. Said corporation had no authority to receive the money, or to discharge the debtors.

I have shown, as I think, that under the old school system, an action to enforce the payment of this note should have been in the name of the township trustees; but, as

that system has passed away, and a new system has been inaugurated under the present constitution, and its management committed to the "board of education," exercising full legislative powers in reference to the public educational institutions of the State, it is necessary to look to that system and the legislation under it, to see if any, and if any, what provisions have been made for the collection of this and other like notes. Here, we find that by an act of the board of education of the 5th of August, 1868, provision is made for the appointment of superintendents of education in each county in the State, under the new system; and by an act of the 11th of August, of the same year, only six days afterwards, all offices of county superintendents, township trustees, and school commissioners, were thereby declared vacant. These were the offices under the old system. And also, by an act of the same date, it is provided that "all moneys, records, books, or other property, now" (then) "in the hands of county superintendents, township trustees, or other school authorities, are" (were) "to be turned over to the county superintendents, or their successors in office."

The language here used is broad enough to embrace, and does embrace, notes then in the hands of township trustees for moneys loaned by them, and, by a fair and reasonable interpretation, it operated as a legislative transfer of the note, the foundation of this action, to the plaintiff as county superintendent of education of said county; and when actually turned over to him by the trustees, he became the legal holder of the same, for the use of schools in said township, and might sue on and collect said note in his own name as county superintendent of education, in like manner as the township trustees, to whom it was made payable, might have done under the law as it existed before the adoption of the present constitution, and the inauguration of the new educational system under its provisions.

For these reasons we hold, that the court below erred in sustaining the demurrer to the plaintiff's complaint.

Let the judgment be reversed, and the cause be remanded for further proceedings, at the appellee's costs.

OWEN *vs.* THE STATE.

[INDICTMENT UNDER § 3690 OF REVISED CODE FOR ENTICING APPRENTICE TO LEAVE THE SERVICE OF HIS MASTER.]

1. *Indenture of apprenticeship made by probate judge under section 1450 of Revised Code; how regarded.*—An indenture of apprenticeship, made by a probate judge, under section 1450 Revised Code, is to be regarded as a deed, and when offered as evidence its execution must be proved as other deeds.
2. *Same; jurisdiction of probate judge, what sufficient to show.*—The jurisdiction of a probate judge in any particular case sufficiently appears, if it be stated in the indenture of apprenticeship itself, that the parents of the child thereby bound out are unable to provide for its support.
3. *Variance; what is not.*—On the trial of an indictment, under section 3690 Revised Code, for enticing, decoying or persuading an apprentice to leave the service or employment of his master, if an indenture of apprenticeship is offered by the State, to prove that the person charged to have been enticed, &c., was an apprentice, and the name in the indictment is George Blair, and in the indenture he is called a certain boy, named George, this is not a variance, but a defective description that may be aided by parol proof.

APPEAL from the Criminal Court of Dallas.

Tried before Hon. GEO. H. CRAIG.

The appellant was indicted and convicted under § 3690 of the Revised Code, for decoying or persuading George Blair and Joseph Moore, apprentices of James A. Blair, to leave the service of said James A. Blair.

It appears from the bill of exceptions, that the solicitor offered on the trial to read in evidence to the jury the articles of apprenticeship of the apprentices named in the indictment, "having first clearly shown that the persons named in the indictment and in the articles of apprenticeship were the same, and not different persons."

The first article of apprenticeship offered to be read to the jury was an indenture under the hands and seals of said James A. Blair and the probate judge of Dallas

county, and recited that the said probate judge "has placed, bound and apprenticed a certain boy named George, aged about ten years, with him, the said James A. Blair, to dwell as an apprentice, until he, the said George, shall attain the full age of twenty-one years, according to the statute in such cases made and provided, the parents of the said George being unable to provide for his support, &c." Then followed the stipulations and agreements required to be entered into by the master under § 1451 of the Revised Code. The execution of this indenture was attested by a witness.

The other article of apprenticeship, with the exception of the name of the apprentice, which was stated to be "Joe, freed boy," was identical with the first.

The defendant objected to either of said articles of apprenticeship being read to the jury; 1st. Because it was not shown that the court of probate had jurisdiction to make and sign and did sign them.

2d. Because there was a variance in the names stated in the indictment and in the names in said articles of apprenticeship.

The court overruled the objections and permitted the articles of apprenticeship to be read to the jury, and defendant excepted.

The rulings of the court to which exception was reserved is now assigned as error.

JASPER N. HANEY, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

PECK, C. J.—Indentures of apprenticeship made by the probate judges, under section 1450, Revised Code, or, as they are called in section 1453, letters of apprenticeship are to be regarded as deeds rather than records, and as the manner in which they are to be proved is not stated, before they can be read as evidence on the trial of an indictment, under section 3690, Revised Code, for enticing, decoying or persuading an apprentice to leave the service

or employment of his master, their execution must be proved as other deeds are proved. They clearly do not prove themselves; therefore, the objection of the defendant to the reading the indentures of apprenticeship, offered as evidence in this case, on the part of the State, because their execution was not proved, was well taken, and should not have been overruled.

2. The other two objections—the one as to the jurisdiction of the probate judge to make said indentures, and the other on account of the alleged variance in the names of the apprentices, as stated in the indictment, and in the said indentures of apprenticeship—were properly overruled.

1. As to the objection to the jurisdiction of the probate judge to make said indentures, said section 1450 declares that “the judge of probate of each county may bind out, as apprentices, the children of any person unable to provide for their support, until the age of twenty-one years, if a male, and eighteen, if a female.” This section confers on probate judges jurisdiction of the subject matter. The only fact necessary to give a probate judge jurisdiction under said section, of any particular case, is, that the person or persons to be apprenticed or bound out, are the children of persons who are unable to provide for their support. This jurisdictional fact the probate judges, respectively, must determine for themselves, when they assume to act in any particular case; and their judgment, in the premises, can only be reviewed in a direct proceeding for that purpose, and can not be impeached in any collateral proceeding. This jurisdictional fact appears to have been ascertained by the probate judge before he bound out the apprentices named in said indentures. In each indenture it is stated that the parents of the child to be thereby bound, were unable to provide for his support. We think it manifest the indentures offered in evidence were made under said section 1450, and as the mode or manner of ascertaining the jurisdictional fact, under said section, or what shall be the evidence of it, is not stated, we hold it sufficient if it be stated in the indentures them-

selves. That is done in these indentures; consequently, there was no error in overruling this objection.

When the probate courts assume to act under section 1454, the reports required to be made to said courts by the officers named in said section, are sufficient to give said courts jurisdiction to apprentice the persons named in such reports. Proceedings, under this section, are required to be recorded, and it may be such records would be the only proper evidence to sustain the jurisdiction of said courts, in such cases, but it is unnecessary to decide, and we do not decide this question in this case, but leave it open to be decided when it becomes necessary.

2. We think there is nothing in the alleged question of variance. It is, really, rather a question of identity than of variance. The identity of the apprentices named in the indictment, and in the said indentures of apprenticeship, was proved without objection before the said indentures were offered in evidence. If a second name had been given to the apprentices, in the said indentures, different from that stated in the indictment, then the objection would have been a good one, but as this is not the case, there is no substantial variance, but rather a mere defective description, which, we hold, may be aided by parol evidence.

Mr. Greenleaf says, "where the time, place, *person*, or other circumstances are not *descriptive* of the fact or degree of the crime, *nor material to the jurisdiction*, a discrepancy between the allegation and the proof is not a variance."—1 Greenl. Ev. § 65.

For the error mentioned, the judgment is reversed and the cause remanded for another trial.

SAWYER & BOULLET *vs.* P. & G. LORILLARD.

[ACTION OF DETINUE.]

1. *Factor, to whom goods are consigned for sale; to what commissions entitled, and what lien has.*—As a general rule, in the absence of any agreement to the contrary, a factor, to whom goods are consigned for sale, is entitled to commissions as such only on the amount of the goods sold, and has a lien upon the goods in his possession, and upon the price of such as may have been sold, not only for his commissions but also for advances, and for disbursements made to preserve the property and all other necessary expenses and charges that are certain, and not sounding in damages merely.
2. *Same, lien of; how may be impaired or lost.*—Such liens may be lost by the voluntary parting with the possession by the factor, or they may be waived by any contract or agreement, by which said liens are surrendered, or become inapplicable—as, for example, if he agrees to deliver the property to, or to hold the same as the property of, a third person.
3. *Principles of law enunciated, applied to case at bar.*—H. and L. N. & Co. purchased a quantity of tobacco from P. & G. L. of New York, and shipped it, in the name of L. N. & Co., to S. & B., factors, at Mobile, Ala., for sale on commission. Afterwards L. N. & Co. and H. disclosed to S. & B. the interest of H. in the tobacco, and informed them that it had been purchased of P. & G. L. on time, and that H. and L. N. & Co. were unable to pay at maturity notes given for the tobacco, and desired to re-transfer it to P. & G. L., and with that view desired a bill of charges on the tobacco in order that P. & G. L. might know exactly what burdens it was subject to. Thereupon S. & B. gave H. and L. N. & Co. a receipt, stating, in substance, that S. & B. had received the tobacco on account of H. and L. N. & Co., and that it “would be delivered on return of the receipt endorsed by them, and payment of charges and commissions incurred thereon.” At the same time S. & B. made out and delivered to H. and L. N. & Co. an itemized bill of the charges, &c., upon the tobacco. H. went to New York, and with the consent of L. N. & Co., transferred the tobacco, and duly endorsed the receipt to P. & G. L., and gave them the bill of charges. P. & G. L. immediately notified S. & B. by telegraph and by letter, and shortly afterwards sent an agent to get possession of the tobacco, who tendered the receipt duly endorsed, paid the bill of charges, and demanded the tobacco. S. & B. refused to deliver, on the ground that they had a lien on the tobacco for commissions, &c., other than those stated in the itemized bill; *Held*,—

- 1st. That the receipt must be construed in connection with the itemized bill of charges and the proof showing the reasons why both were given.
- 2d. That thus construed the receipt amounted to an agreement on the part of S. & B. to deliver the tobacco to P. & G. L., if it should be re-transferred to them, upon payment of the charges in the itemized bill and the return of the receipt, duly endorsed, within a reasonable time.
- 3d. That the receipt was a waiver by S. & B. in favor of P. & G. L. of any lien S. & B. may then have had on the tobacco for commissions or charges not contained in the itemized bill.
4. *Qualification of written charge; when not error.*—A judgment will not be reversed, because a charge in writing, asked to be given, is given with a qualification, if the charge itself might have been refused without error. Such qualification, if it be an error at all, is an error without injury.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

This was an action of detinue, brought by the appellees, P. & G. Lorillard, against the appellants, Sawyer & Boullet, to recover certain sample packages of tobacco mentioned in the complaint. The record does not disclose upon what pleas issue was joined. There was a verdict and judgment in favor of the plaintiffs below.

The material facts of the case, as shown by the bill of exceptions, are as follows: In the summer of 1867 a large quantity of tobacco was purchased in New York from the appellees by J. T. Henderson, of Georgia, and L. C. Norvill & Co., of New Orleans, La. It was shipped to the appellants as factors, to be sold on commission, purporting to come to them from L. C. Norvill & Co., of New Orleans, and was received during the month of September, 1867. The appellants had no knowledge of any other owner of the tobacco, until about the 18th of October, 1867, when said Henderson and C. L. Norvill made known Henderson's interest and informed appellants that the tobacco had been purchased of appellees on three months time, and that Henderson and Norvill & Co. would be unable to pay at maturity their notes given for the purchase-money, and therefore intended to negotiate with appellees for a re-transfer of the tobacco to them, and, with a view to enable them to do this, desired a bill of all the

Sawyer & Boullet v. P. & G. Lorillard.

charges on the tobacco, so that appellees might know the burdens and charges on the tobacco in the hands of appellants. Thereupon the appellants, Sawyer & Boullet, gave Henderson and Norvill & Co. a receipt as follows :

“MOBILE, Oct. 18th, 1867.

Received from L. C. Norvill & Co., on consignment and for sale, 594 boxes of tobacco, sundry brands ; twenty-three cases of tobacco, sundry brands, shipped by P. & G. Lorillard, of New York, for account of J. T. Henderson and L. C. Norvill & Co., now stored in bonded warehouse No. 2, in this city, which will be delivered on return of this receipt, endorsed by them, and payment of charges and commissions incurred thereon.

SAWYER & BOULLET.”

At the same time appellants gave Henderson the bill of charges against the tobacco, which is made part of the bill of exceptions and set forth in the transcript as exhibit “B.” This was a statement of an account between L. C. Norvill & Co. and appellants, and contained an itemized statement of the various charges on the tobacco, which, after the credits allowed, amounted to \$1,309 56-100. The statement in the bill of exceptions is that exhibit “B” was made out and given to Henderson and Norvill at the time of their visit to Sawyer & Boullet, when the receipt, dated October 18th, was given ; but the last debt item on exhibit “B” is dated Nov. 9th, 1867, and is as follows : “Commission 5 per cent. on \$1,253 40—\$62 67,” and some 14 items in the account are dated after the 18th of October, 1867.

The bill of exceptions further recites, that Henderson, with the consent of the said Norvill, then went directly to New York and made the negotiation to re-transfer the tobacco to plaintiffs, and endorsed and delivered to them the receipt given out by the said defendants, dated the 18th of October, 1867, with the bill of charges against it, as shown in exhibit “B ;” that the defendants were immediately advised by telegraph of the transfer of the tobacco by the said Henderson to the said plaintiffs, and on the 29th of October, 1867, plaintiffs advised the defendants by

letter of the transfer of the said tobacco to them ; that the agent of the plaintiffs, George W. Yerby, advised the defendants by letter from Augusta, Georgia, dated 4th of November, 1867, that he was then on his way to Mobile to take possession of the said tobacco.

It further appeared from the bill of exceptions that some time after November 4th, 1867, Yerby, agent for the appellees, arrived in Mobile and paid the bill of charges set forth in exhibit "B," and demanded possession of the tobacco, but the appellants refused to deliver it unless Yerby would pay another bill, purporting to be an individual account between said L. C. Norvill or L. C. Norvill & Co., amounting to \$1,203 37." Yerby at first refused to pay this last bill, insisting that it was not a proper charge against the tobacco or against the Lorillards, and Henderson, while this dispute was going on, was sent for and came from Georgia to Mobile to aid Yerby in obtaining possession of the tobacco for the appellees. The proof further showed that the defendants agreed on the payment of this bill (marked "D," purporting to be an account against Norvill, or Norvill & Co. ;) that they would at once deliver the whole of the property to the plaintiffs, and thereupon the said bill was paid, and the defendants undertook to deliver the property to the plaintiffs ; that the plaintiffs actually surrendered to the defendants the receipt to Henderson and L. C. Norvill & Co., endorsed by them, and the property in the warehouse was actually transferred to the plaintiffs, or their agent, the said Yerby, and the defendants then and there agreed to hold the sample boxes subject to the order of the said Yerby, said boxes being then in defendants' office ; that said Yerby sent for them a few days afterwards and the defendants refused to deliver them, and then addressed to the said Yerby a note as follows :

MOBILE, Nov. 25th, 1867.

Mr. G. W. Yerby, Battle House :

DEAR SIR—We are informed that you are making arrangements to either ship or turn the tobacco over to some

Sawyer & Boulet v. P. & G. Lorillard.

other house, thereby depriving us of the commission that is justly due us. After advising with our business friends and counsel we hereby notify you that we will not release the tobacco unless the commission is paid, according to the original contract made when we first received it for sale. If we have been misinformed, and you still intend for us to sell it we will be glad to do so, otherwise we will protect ourselves.

Trusting that this much vexed question will cause no hard feelings between us, we remain truly,

SAWYER & BOULET.

The proof tended to show, that after this letter was sent to the agent, Mr. Yerby, the defendants claimed as commissions, still due and unpaid on property unsold, about \$1,500 00. There was no proof in the cause that the defendants ever claimed, or pretended to claim, any commissions on the property unsold by them prior to the date of the letter above copied; but the proof of the plaintiffs was that no such claim was ever set up before that date.

The proof of the defendants tended to show that the defendants, at the instance of said Norvill & Co., paid all the freight and charges, effected insurances, attended to the usual custom house duties, assessing the revenue tax, &c., and gave bond to the government for some \$16,000 00, and furnished their own securities, made advances in money as shown in the schedules B and D, heretofore mentioned; that defendants had taken samples and prepared the property for sale, and had expended a great deal of time and labor in and about the shipment, which was according to their duty as factors, the said owners not being in Mobile. There was no specific agreement between consignors and consignees as to the services of the said defendants, except that it was agreed that said defendants were to pay all costs and expenses, and were to charge and receive 5 per cent. for selling and $2\frac{1}{2}$ per cent. on their advances. There did not appear to have been any understanding or agreement as to what should be the defendants compensation in case the goods were withdrawn before sale, and no provision for

such a case other than such as may be inferred from said receipt above copied. There was proof tending to show the value of the services rendered by the defendants. The evidence tended to show that all the charges and expenses charged by the defendants on the tobacco up to the time of its withdrawal from their hands were paid by the plaintiffs, but no commissions on unsold property, or compensation for the services of the defendants were paid, except such as are shown in schedules B and D, and none were ever demanded prior to the date of the letter of the 25th of November. All the tobacco except the sample boxes (the subject of this suit) were delivered to plaintiffs actually, and the proof as to the delivery of the sample boxes was as above stated. These sample boxes were in the defendants' office when this suit was brought.

The plaintiffs' proof tended to show that the defendants had waived all right to commissions or other compensation, and had in consideration of payment of their charges and advancements, as shown in schedule B, agreed to deliver up all the tobacco, and the whole transaction was ended. On the other hand, the evidence of the defendant, Sawyer, tended to show that the commissions were not charged on the unsold goods in the bills paid, because defendants still expected to sell the tobacco as factors of the plaintiffs, and the charges as commission on unsold goods were only intended to be reserved and not waived, and that the possession of the tobacco, and defendants' agreement to deliver the property, was obtained by deception and false representations, but the testimony on these points was conflicting.

When the testimony of witnesses was offered, to show the custom of merchants in Mobile not to charge commissions on goods not sold as above specified, defendants objected, on the ground that it was contrary to the written agreement between the parties, as appeared from the said receipt. This objection was overruled, and the plaintiffs were permitted to show by their witness that no commissions were charged when the goods were withdrawn with-

out sale. Some witnesses proved to the contrary, and the evidence was conflicting on this point. Some merchants made charges in such cases and some did not.

The defendants duly excepted to the ruling of the court.

The court charged the jury, among other things, "that it was his duty to charge upon the legal effect of the written receipt, and further said that it did not provide for commissions to be paid in case the goods were withdrawn before sale, but that commissions on sales must be caused by sales before they could be charged as such, and whether or not the defendants were entitled to compensation for their personal services, depended upon the defendants' proof, and they must look to that to see whether they were so entitled; that the defendants were not entitled to commissions as such on the goods not sold, unless the proof showed that there was an established uniform custom among merchants in Mobile, authorizing such charge; without such custom defendants had no lien on the goods sued for, for commissions on unsold goods; nor were the defendants entitled to any lien for their general services rendered by them, in and about the shipment, such as proposing it for sale, running about seeking buyers, and other such personal attention and duties; that to create a lien in favor of a factor for his personal services and attention, in all cases when the goods are withdrawn without sale, the charge must be for specific liquidated sums, and not for such open demands as have to be enquired of and passed upon by a jury. The lien of a factor might be waived by a voluntary delivery of the possession of the property, and if the parties in this case had agreed to deliver up all the goods, and the bulk of them had been delivered in the name of the whole, and with the express intention to deliver the whole, that this would amount in law to a delivery of the whole, and that no mistake or misunderstanding of one of the parties would change this effect unless this mistake or misunderstanding was produced or contributed to by the other party; to which charges, and every part thereof, the defendants excepted."

At the request of the defendants the court gave to the jury the following charge :

"If the defendants have proved any and specific services necessary and proper in and about the shipment, and pertaining to the goods, and a part of their duties as factors, they are entitled to payment, and have a lien on the goods for such services."

The charge was given as asked, but with the qualification contained in the charge of the court, and to this action of the court in qualifying the charge, the defendant excepted.

The errors assigned are—

1. The charge of the court as excepted to in the bill of exceptions.

2d. The qualification of the charge asked by appellant.

3d. The ruling of the court in permitting witnesses to be examined as to the custom at Mobile, as shown in the bill of exceptions.

DARGAN & TAYLOR, for appellants.

L. GIBBONS, *contra*.

[The Reporter was unable to obtain the briefs in this case.]

PECK, C. J.—1. As a general rule, in the absence of any contract to the contrary, a factor, to whom goods are consigned for sale, is entitled to commissions as such only on the amount of the goods sold.—Story on Agency, § 329.

2. What these commissions are, is commonly regulated by the usage of trade, at the particular place where the business is transacted, and is usually the allowance of a certain per centage upon the value of the goods sold.

Where there is no usage of trade at the place, a reasonable compensation is allowed ; but in all cases, this will be governed and controlled by the agreement of the parties, where such an agreement exists.—Same book, § 326.

3. A factor has a lien upon the goods in his possession, and upon the price of such as may have been sold, not

Sawyer & Boulet v. P. & G. Lorillard.

only for his commissions, but also for advances and for disbursements made to preserve the property, and for all necessary charges and expenses that are certain and not sounding in damages merely.—Story on Agency, §§ 356, 364, 376 ; 2 Kent's Com., 3d ed. p. 640, Lecture 41. This lien, except in a few limited cases, confers on the factor no authority to sell the goods to satisfy his lien, but is confined to a right to retain the possession until his claims are paid by the owner, and is a defense to any action brought against him to recover the property—for example, if he has made advances upon the property, he may sell to repay himself for such advances, if the owner, after due notice of his intention to sell for such advances, fails to pay them.—Story on Agency, § 371 ; *Parker v. Brancker*, 22 Pickering, 40.

4. This lien may be lost by the voluntary parting with the possession.—Story on Agency, § 367 ; Jones on Bailments, appendix 52 ; *Sweet et al., Assignees of Gard, a Bankrupt, v. Pym*, 1 East, 18. Or, it may be waived by any act or agreement between the parties by which it is surrendered, or it becomes inapplicable. As if, while the property is in the hands of a factor, with a lien attached to it, he agrees to hold it for, or as the property of a third person, this amounts to a waiver of the lien.—Story, § 366.

5. Applying these principles to the case in hand, the first question that naturally presents itself is, what is the legal effect of the receipt of the appellants, defendants below, dated the 18th day of October, 1867. This receipt is in the words and figures following, to-wit :

“MOBILE, Oct. 18th, 1867.

Received from L. C. Norvill & Co., on consignment and for sale, 594 boxes of tobacco, sundry brands, twenty-three cases of tobacco, sundry brands, shipped by P. & G. Lorillard, of New York, for account of J. T. Henderson and L. C. Norvill & Co., now stored in bonded warehouse No. 2, in the city of Mobile, 1st District of Alabama, which will be delivered on return of this receipt endorsed by them, and payment of charges and commissions incurred thereon. (Signed) SAWYER & BOULET.”

How this receipt came to be given is disclosed in the defendants bill of exceptions, and may be stated as follows: The said Henderson, of Georgia, and Norvill & Co., of New Orleans, in the summer preceding the date of said receipt, purchased said tobacco of said P. & G. Lorillard, of New York, plaintiffs below, on time, and would not be able to pay the note given for it at maturity, which, at the date of said receipt, would soon be due and payable, and they wished to negotiate with plaintiffs for the re-transfer of said tobacco. These facts were not known to defendants until the giving of said receipt, when they were explained to them, and said receipt was given to enable said Henderson and said Norvill & Co. to accomplish their object, and to help on their wishes in the matter; they desired to show to the plaintiffs the burthens and charges on the tobacco in the defendants hands; therefore, defendants gave said receipt, and at the same time a statement of the charges against said tobacco, which is made an exhibit to, and a part of said bill of exceptions, marked exhibit B. The gross amount of said charges, by said exhibit, appears to be \$2,741 06, but credited with \$1,431 50, leaving the balance \$1,309 56 unpaid.

To understand the legal effect of this receipt, it must be interpreted in connection with said exhibit B, as a part of it, showing the burthens and charges on said tobacco at the time said receipt was given, with the proof disclosing the reasons for giving it and the objects and purposes for which it was given, and the use intended to be made of it. So interpreted, it amounts to an agreement on the part of defendants to deliver the tobacco to the plaintiffs, if it should be re-transferred to them on their returning said receipt, duly endorsed, and paying the charges due on the same, as specified in said exhibit B; and it also operates as a waiver of any lien the defendants may then have had on the tobacco for other commissions or charges not specified in said exhibit B. To permit the defendants to withhold the tobacco from the plaintiffs, upon the alleged ground that they have a lien upon it for other commissions

or charges not specified in said exhibit B, will be a manifest fraud upon them.

The plaintiffs might well trust to said receipt, and as the evidence shows, did trust to it and acted upon it. On the faith of said receipt the tobacco was re-transferred to them. The said receipt was endorsed, and with said exhibit B, specifying the charges on the tobacco, delivered to them, and of this the defendants were immediately advised by telegraph.

Thereupon the plaintiffs sent their agent to Mobile, to take possession of said tobacco, who paid to, and the defendants received from him, the money for the charges specified in said exhibit and receipted for the same—defendants thereby were legally bound to deliver the tobacco to plaintiffs' agent, and their refusal to deliver it on his request was a breach of their promise made in said receipt to do so, and the plaintiffs at once might have instituted an action for its recovery.

The defendants, although they received the money for the charges, &c., specified in said exhibit B, without objection, refused to deliver said tobacco to said agent, unless he would pay another account for \$1,203 37, purporting to be an individual account of C. L. Norvill & Co. with said defendants, a copy of which is made a part of said bill of exceptions, and marked exhibit D. This the said agent at first refused to pay, but at length did pay, on the agreement of the defendants to deliver to him the whole of said tobacco. And on the payment of said account, the defendants did deliver to said agent the tobacco then in the said warehouse, but a part of it, consisting of certain sample boxes, &c., (the subject of this suit,) being in defendants' office, they agreed to hold them subject to the order of said agent. A few days afterwards, said agent sent for said sample boxes, when defendants refused to deliver them, but addressed to said agent the note or letter, dated Nov. 25th, 1867.

No intimation is given in this letter that the agreement to deliver the tobacco, and the whole of it, on the payment

of the said sum of \$1,203 37 was not fairly made, or that it was obtained by any false representations of said agent, or of any one else, or that said sample boxes were withheld because they were entitled to be paid any thing for their labor or trouble in preparing the tobacco for sale, or for any other reason than the one stated, to-wit: that by some agreement, made when they first received it for sale, they were to be paid certain commissions, without stating what the agreement was, or the commissions thereby stipulated to be paid. If any doubt can exist as to the waiver of any lien on the tobacco for any burthens or charges beyond what was embraced in said exhibit B, it is removed by the agreement to deliver it on the payment of said sum of \$1,203 37. That agreement is too plain and explicit to be misunderstood. Besides, no such lien is named in said letter. The only claim there mentioned is based upon some arrangement or agreement, not with the plaintiffs, but with the parties from whom they received the tobacco. Whatever that may have been, it can not be set up as a defense to this action. It imposes no obligation on the plaintiffs, nor can it create any lien on the property, to their prejudice. If any such lien existed in favor of the defendants while the said Henderson and Norvill & Co. continued to be the owners, it was destroyed by the re-transfer of it to the plaintiffs, by virtue of said receipt of the 18th of October, 1867, and the subsequent agreement of defendant to deliver it to their agent on the payment of said sum of \$1,203 37 above referred to. Any claim the defendants may have, by the alleged agreement in said letter for commissions, or on any other account, can not justify or excuse the violation of their agreement to deliver the tobacco to the plaintiffs' agent; at most, it is a mere individual claim against the parties with whom the said agreement may have been made, which can only be enforced by an action personally against them. So, too, if the defendants, by virtue of any understanding or agreement with the parties from whom they received the tobacco, are entitled to any compensation on its withdrawal before sale, it is a personal claim in their favor, not against

the plaintiffs, but against those parties. Such a claim to compensation is, in no proper sense, a lien on the property withdrawn. The very basis of a factor's lien depends upon his possession of the property on which the lien is claimed, and when the possession is parted with, or an agreement is made to deliver the property to, or to hold it for a third person, the lien is lost or waived.—Story on Agency, § 366. But there is no evidence in this case to sustain the alleged claim of defendants, set up, or referred to, in said letter. On the contrary, the bill of exceptions states that “there was no specific agreement between the consignors and consignees, as to the services of the said defendants, except that it was agreed that defendants were to pay all costs and expenses, and to charge and receive 5 per cent. for selling, and $2\frac{1}{2}$ per cent. on their advances. There did not appear to have been any understanding or agreement as to what should be defendants' compensation in case the goods were withdrawn before sale, and no provision for such a case other than may be inferred from said receipt above copied.” (The said receipt of the 18th of October, 1867.)

Whatever compensation the defendants might be entitled to, if any, on the tobacco withdrawn before sale, under the circumstances, depended upon the usage of trade on this subject in the city of Mobile. There was no error, therefore, in permitting witnesses to be examined by the plaintiffs, as stated in the bill of exceptions, against the defendants' objection, “to show the custom of merchants in Mobile not to charge commissions on goods not sold, as above specified.” The ground of defendants' said objection is, “that it was contrary to the written agreement between the parties, as appeared from said receipt,” that is, the said receipt of the 18th of October, 1867.

This objection is clearly without force, as said receipt says nothing on this subject.

Taking the charge of the court as a whole, or by its several paragraphs, I am unable to discover any error available to the defendants in it.

Some of its parts or paragraphs may not seem to be

altogether pertinent or necessary, nor, perhaps, expressed in the clearest language, but the law is correctly stated in all of them, and I do not see that the jury could be thereby misled to the prejudice of the defendants. The only real defense to this action depends upon the fact, whether the defendants had a lien on the property, at the time the suit was brought. Whatever lien they may have had, if not discharged by the payment of the burthens and charges specified in the statement of them, delivered to the consignors, at the time the said receipt of the 18th of October, 1867, was given, was undoubtedly waived by their subsequent agreement to deliver the property to the plaintiffs' agent, on the payment of the said sum of \$1,203 37. That was their agreement, and having received the consideration, and retained the same, they have no justification or excuse for refusing to discharge the duty thereby imposed upon them. It seems to me, on the case stated in the bill of exceptions, the court, without error, might have instructed the jury, if they believed the evidence, their verdict should be for the plaintiffs.

After said charge was given, the defendants requested the court to give to the jury the following charge in writing, to-wit: "If the defendants have proved any specific services, necessary and proper, in and about the shipment, and pertaining to the goods, and a part of their duties as factors, they are entitled to payment, and have a lien on the goods for such services."

This charge the court gave "in the terms in which it is written," but said it was given "with the qualifications contained in the first charge," to which qualifications defendants excepted. If services such as referred to in this charge were rendered, they were rendered by the defendants before their said agreement to deliver the property on the payment of said sum of \$1,203 37, and if they then created a lien on the property, it was, with all other liens, waived by said agreement. For this reason, if for no other, said charge might, and I think should, have been refused, and if the charge itself might have been refused,

Tuskaloosa Scientific and Art Association v. Green.

without error, it follows that the qualification, if an error at all, is an error without injury. The judgment is affirmed at the appellants' cost.

TUSKALOOSA SCIENTIFIC AND ART ASSOCIATION vs. GREEN.

[ACTION TO RECOVER AMOUNT SUBSCRIBED FOR STOCK, &c.]

1. *Dissolution of corporation; effect of, on its right to sue.*—The dissolution of a corporation in this State does not effect its right to sue and be sued, until the lapse of five years after such dissolution.—Rev. Code, § 1775.
2. *Tuskaloosa Scientific and Art Association; charter of, creates a contract which the State can not impair by repeal of charter.*—The charter incorporating the Tuskaloosa Scientific and Art Association, made it a body corporate to continue of force for twenty-five years from the date of the act incorporating it, and constituted a contract between the State and the corporation, which it is beyond the power of the general assembly to repeal or impair by subsequent legislation. The act of the general assembly of Alabama approved March 9th, 1871, repealing the charter, is unconstitutional and void. (*Per PETERS, J., the court expressing no opinion on this point.*)

APPEAL from the Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

The appellant, in its complaint, claimed of the appellee "one hundred dollars for one share of the capital stock of their association, by them sold and delivered to the defendant, and for which he refuses to pay."

A jury trial was waived, the decision of the case submitted to the court on an agreed state of facts, in substance as follows: On the 11th day of March, 1871, defendant agreed to buy from the plaintiffs one share of the capital stock of the Tuskaloosa Scientific and Art Association, and afterwards refused to pay for the same, although a proper

certificate of stock for one share of the value of one hundred dollars was duly tendered him, the sole ground of refusal being that the plaintiff had no legal existence, their charter having been repealed by an act of the general assembly of Alabama entitled "An act to repeal an act entitled an act to incorporate the Scientific and Art Association," &c., approved February 3d, 1866, which repealing act was approved March 9th, 1871. The passage of the act of incorporation and the organization of the plaintiff under it, were admitted, as also the passage of the repealing act.

The court rendered judgment for the defendant and taxed plaintiff with costs, and hence this appeal.

MANNING & WALKER, and H. ST. PAUL, for appellant.—The Tuskaloosa Scientific and Art Association was incorporated by an act of the legislature of Alabama approved February 3d, 1866.

This charter was granted under the constitution adopted by the people of Alabama, and existing at the time of the adoption of the present one.

Under the laws then in force, the only mode by which chartered privileges could be annulled, are pointed out in the following sections of the Code: 1773, 1790, 3079, 3080, 3081, 3082, and following.

Outside of the causes assigned in these sections, the judiciary and much less the legislature, could neither amend nor repeal the vested right of any corporation, against the will of the corporators.

But the defendant pleads that under section 1, article 13, of the constitution of 1867, treating of corporations, "all general laws and special acts passed pursuant to this section may be altered, amended, or repealed."

That such powers exist as to corporations created subsequent to the adoption of that constitution may be admitted; but plaintiffs' charter was not granted under that instrument, and stands protected by the organic laws in force at the time of its passage, and those laws had provided the sole means whereby vested rights might be taken away.

In the absence of any allegations tending to show that the corporation has violated the provisions of their charter, that charter is inviolable, under the constitution of the United States, and the universal jurisprudence of the country.

That a State can not, through a constitutional enactment, violate contracts which ordinary legislation could not effect, is too elementary a principle to require argument before an enlightened court.

But this court, in the case of *Broadbent v. Tuskaloosa Scientific and Art Association*, forestalled the objection which might result from a repeal of the plaintiffs' charter. We rest on that case, not only on account of its intrinsic worth and direct bearing on the present case, but also on account of the authorities therein cited.

A. MCKINSTRY, *contra*. (No brief on file.)

PETERS, J.—This case was decided on an agreed state of facts in the court below. And there seems to be but a single question contested in this court. That is this: Was the act of the general assembly of this State approved the 9th day of March, 1871, entitled "An act to repeal an act to incorporate the Tuskaloosa Scientific and Art Association, for the purpose of encouraging science and art, and aiding the University of the State in replacing its library and establishing a scientific museum," a valid law? That is, did the repealing act destroy the corporate powers of said association? This latter act contains but a single section, which is thus expressed: "Section 1. *Be it enacted by the General Assembly of Alabama*, That 'An act to incorporate the Tuskaloosa Scientific and Art Association, for the purpose of encouraging science and art and aiding the University of the State in replacing its library and establishing a scientific museum,' be, and the same is hereby repealed." Some time before this repealing act was passed, the appellee, Green, agreed to purchase one share of the stock of said association, and pay for the same the sum of one hundred dollars, but after the repeal he refused to comply with his agreement, upon the ground that the re-

peal had destroyed the corporation. And the suit in the court below was instituted by the appellant to recover said sum of one hundred dollars thus agreed to be paid. It seems that the court below gave judgment against the corporation, on the grounds that it had been dissolved by the repealing act, and could not maintain this suit, or upon the ground that the consideration of the promise had failed on account of the dissolution thus effected. I think in each of these positions the court erred.

The dissolution of a corporation in this State does not effect its right to sue and be sued until a lapse of five years after such dissolution, even when the dissolution is legal and effectual.—Revised Code, § 1775. Then the corporation had the right to sue and recover upon its contract, if it was a legal contract. There is no pretense that the agreement to purchase a share of the corporate stock was illegal when made. It was such a contract as the law of the incorporation authorized. The general assembly could not by any subsequent enactment defeat or impair this contract. This is now too well settled to need the recital of authorities. Both the State and the national constitution forbid it.—Const. Ala. 1867, Art. 1, § 24; Const. U. S., Art. 1, § 10, cl. 1; Paschall's Const. U. S., pp. 153, 155, 156, and case there cited. The corporation had done nothing to vitiate the contract of sale of one share of its stock, and there was no express or implied warranty against a repeal of the law creating the corporation. Its failure was, then, one of the risks that the purchaser of its stock took upon himself. He could not then be entitled to be released for this reason, when the corporation was not in fault. If the repeal was of any force, it was, in part, the act of the purchaser himself.

The act of the general assembly of this State, approved February 3, 1866, entitled "An act to incorporate the Tuskaloosa Scientific and Art Association, for the purpose of encouraging science and art, and to aid the University of the State in replacing its library and establishing a scientific museum," creates a private corporation. The *first* section of the act very clearly shows this. Omitting the

enacting clause, it is in these words: "That Hampton S. Whitfield and William H. Fowler, and their associates and successors, be and they are hereby created a body corporate, by the name and style of the Tuskaloosa Scientific and Art Association, for the purpose of the encouragement of art and science in the distribution of works of art and to aid the University of Alabama in replacing its library and establishing a scientific museum."—Pamph. Acts 1865–66, p. 269; *Broadbent v. Tuskaloosa Scientific and Art Association*, 45 Ala. 170; 4 Whea. 668; 9 Whea. 907; 2 Bac. Abr. *Corporations*, p. 437; Ang. & A. on Corp. 1; Kydd on Corp. 13; 1 Cowen, 670, 684. The Corporation thus established was authorized to continue in force for twenty-five years from the date of the passage of the act of its creation. The *tenth* section of said act shows this, beyond all reasonable doubt. It is in the following words, leaving out the enacting clause: "That this act of incorporation shall continue and be in force for the space of twenty-five years from the date of its passage, and that *all* laws and *parts* of laws in conflict with its provisions be *pro tanto* repealed." Pamph. Acts, *supra*, p. 272. This period does not expire until the 4th day of February, 1891.—Revised Code, § 14. Such a law as this enactment is usually called a *Charter*. It is a *contract* between the State and the citizen, and its stipulations can not be impaired by the State, or interfered with, except for causes of forfeiture on account of abuse of its powers.—Rev. Code, § 3079, *et seq.* If the State can grant the charter at the time it is made, it can not recall its act by a repealing law, unless this is a power retained at the time of the passage of the act, or by constitutional provision, which, as the law of the contract of incorporation, enters into it when it is made. In the case of *The Binghamton Bridge*, Mr. Justice DAVIS declaring the opinion of the court, says: "We have supposed, if anything was settled by an unbroken course of decision in the Federal and State courts, it was, that an act of incorporation was a *contract* between the State and the stockholders. All courts, at this day, are estopped from questioning this doctrine. The security of property rests upon it, and every

successful enterprise is undertaken, in the unshaken belief that it will never be forsaken. A departure from it *now* would involve dangers to society, that can not now be foreseen,—would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government. An attempt even to re-affirm it could only tend to lessen its force and obligation.”—*The Binghamton Bridge*, 3 Wall. 51, 73; *Dartmouth College v. Woodward*, 4 Wheaton, 418; 18 How. 331; 1 Black. 436; 1 Wall. 117. It is true, that the law creating this incorporation was passed by the general assembly of the *provisional* government of this State, which was set up here after the failure of the rebellion. But such laws have been uniformly held valid by this court.—*Scruggs and Wife v. Mayor, &c. of Huntsville*, 45 Ala. 220; 45 Ala. 170, *supra*. The Revised Code was received and adopted by this government, and the salaries of all the chancellors and circuit judges of the State were fixed by the same authority, and also many corporations were created.—Pamph. Acts 1865–66, p. 58, No. 35; Pamph. Acts 1866–67, p. 718, No. 662. It would lead to very serious confusion, if not to amazing injustice, to withdraw all constitutional protection from the legislative enactments of this *provisional* government. Unless this is done, the attempted repeal of the charter of incorporation in this case is of no validity. It is unconstitutional and utterly void.—2 Dal. 308; 1 Cr. 137. This charter, *because it was a contract*, is an irrevocable law. It is protected from violation, both by the constitution of the State and the constitution of the Union.—Const. Ala. 1819, Art. 1, § 19; Code of Ala. p. 31; Const. U. S., Art. 1, § 10, cl. 1. The repealing act of March 9, 1871, was of no force; and it was error in the court below to allow it any validity whatever.

The majority of the court, however, confine their concurrence in this opinion strictly to the reversal, without approving or disapproving the intimation that the act of March 9, 1871, repealing the act of February 3, 1866, by

Carroll et al., Adm'rs, v. Vaughan, Ex'r.

which the Tuskaloosa Scientific and Art Association was incorporated, is void.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

CARROLL ET AL., ADM'RS, *vs.* VAUGHAN, EX'R.

[APPEAL FROM JUDGMENT SETTING ASIDE JUDGMENT, ON MOTION FOR SUPERSEDEAS AND GRANTING NEW TRIAL.]

1. *Appeal; what judgment will not support.*—A judgment of the circuit court granting a new trial under section 2814 of the Revised Code, is not such a final judgment as will support an appeal.—42 Ala. 31, 167.

APPEAL from the Circuit Court of Marengo.

Tried before Hon. LUTHER R. SMITH.

WM. M. BROOKS, for appellant.

WATTS & TROY, *contra*.

PETERS, J.—This is a proceeding to set aside a judgment and grant a rehearing under the statute.—Rev. Code, § 2814. The prayer of the petition was granted in the court below, and a rehearing was allowed. The respondents in the proceeding for rehearing, and the plaintiffs in the judgment, appeal to this court. They assign for error the overruling of their demurrer to the petition, and the judgment of the court setting aside the judgment and granting a new trial.

The Code declares, that “where a party has been prevented making his defense by surprise, accident, mistake, or fraud, without fault on his part, he may, in like manner, apply for a rehearing, at any time within four months from the rendition of the judgment.”—Rev. Code, § 2814. In treating of this statute, this court has declared, that “the petition must be regarded as a new action, the object of

Bowen et al., v. Montgomery et al., Ex'rs.

which was to obtain a rehearing and trial on the merits in the original action, and to vacate the judgment which had been rendered in it."—*Pratt & McKenzie v. Keils & Sylvester*, 28 Ala. 390, 397; *Garrett & Bibb v. Terry*, 33 Ala. 514, 515. But the judgment granting the rehearing is not final. It does not put an end to the suit. It is interlocutory. From such a judgment there is no appeal.—*Callahan v. Lott, Adm'r*, 42 Ala. 167; *Lockhart v. Wyatt*, 42 Ala. 31; *Fuller and Wife v. Boggs*, January term, 1872. On the authority of these cases the appeal must be dismissed, at appellants' cost.—See, also, 28 Ala. 390, 399.

The appeal is therefore dismissed, at appellants' costs.

BOWEN ET AL. vs. MONTGOMERY ET AL., EX'RS.

[FINAL SETTLEMENT OF EXECUTORS' ACCOUNTS.]

1. *Executor; when should not be charged with promissory note not collected by him.*—An executor should not be charged with the amount of promissory notes payable to his testator, because they remain in his hands uncollected, when it is shown that the maker claimed a larger amount against the estate on a contract with the testator for work to be done, which was done, and that an attorney, whom the will requested should be consulted on such matters, advised against suing on the notes.
2. *Executor; what currency was not bound to apply to his own compensation during late war.*—An executor during the late war was not obliged to appropriate Confederate currency, received from the sale of crops and other products, in satisfaction of his services to the estate. If he improperly disposed of the property, he ought to have been charged with waste.
3. *Distributee, entitled to support out of estate while kept together; when probate court has not jurisdiction to ascertain and decree value of.*—A distributee was entitled to support out of the estate, free of charge, during the time it was kept together, but did not receive it,—*Held*, that the probate court had no jurisdiction to ascertain its money value, and decree the amount to her in the distribution.
4. *Objection to voucher; what properly overruled.*—This court can not say there was error in overruling an objection to an entire voucher, part only of which was proved.

Bowen et al., v. Montgomery et al., Ex'rs.

APPEAL from the Probate Court of Autauga.

Tried before Hon. W. G. M. GOLSON.

The opinion states the material facts of the case.

WATTS & TROY, for appellants.

W. H. NORTINGTON, *contra*.

B. F. SAFFOLD, J.—The appellees, as executors of the will of William Montgomery, deceased, were making a final settlement of their administration, when the appellants moved the court to charge them with the amount of two promissory notes due from Joseph S. Reese to the testator. The existence of the notes, and the possession of them by the executors, were relied on to sustain the motion. In opposition, it was shown that Reese claimed a larger demand against the testator by account for cutting of a ditch, and for ferriage. The ditch was cut, and the executors, being in doubt as to what was their duty, consulted with W. H. Northington, an attorney-at-law, and a friend of the testator, who requested them in his will to confer with him touching all legal questions that might arise in connection with their administration. He advised that no suit should be brought against Reese. It was not imperative on the executors to be governed by his advice, but some degree of their responsibility was avoided by acting upon his counsel. Sufficient doubt of the result of a suit was shown to overcome the *prima facie* evidence of waste afforded by the notes. There was no error in the action of the court on this point.

The exception to the allowance of \$7,350 for extra services rendered by the executors between the first of October, 1859, and the first of January, 1866, was confined to the years of the late war, and based on the fact that they had, in January, 1864, and until the close of the war, a sufficient amount of Confederate currency to pay for these services, which they had obtained from sales of crops, and of the products of mills, in 1863. It is not shown that there was any mismanagement in making these sales, or in

obtaining the Confederate currency. There was certainly no greater obligation on the executors to receive payment for valuable services in this currency than there was on the people generally. The Confederate government did not force its acceptance. The people were at liberty to receive it in satisfaction of their demands, or not, as they chose. There was no error in overruling this exception.

The testator directed that the children should be supported out of his estate, free of charge, during the time it should be kept together. One of them, Mrs. Bowen, who had received only a partial support, on account of her non-residence with the family, offered to prove what was the value of her support, with a view to have the amount allowed to her in the distribution. The court decided that it had no jurisdiction of the question, and refused to hear the evidence. She undoubtedly had a claim against the executors and the estate for some amount. But she could not sue for and recover it in the way she proposed. It was not a part of her distributive share, and it was not embodied in the account of the executors. In one of these forms only could the probate court deal with it. The court did not err in this particular.

The executors asked for a credit of \$2,429.42, which they had paid to Mrs. Ann Montgomery, the widow of the testator. To this Mrs. Bowen excepted generally. It seems to have been conceded on the part of the executors, that Mrs. Montgomery was not entitled to the money, except by virtue of a release of their right to it, signed by all of the distributees except Mrs. Bowen. It was signed by the husband of Mrs. Bowen, though it purported to be the act of the distributees only. Certainly, a husband can not dispose of the wife's separate estate in that way.—Rev. Code, § 2273. The conveyance was entirely sufficient in support of the credit except as to Mrs. Bowen's interest, which was one-fourth. It does not appear that she objected alone to the allowance of so much as would have been her share, but to all of it. In *Pearson v. Darrington*, (32 Ala. 264,) it was held that the appellate court can not say there was error in overruling an objection to an entire

voucher, part of which was proved. It is not the duty of the court to shape or remodel the propositions of parties or their counsel, and when a party asks more than he is entitled to, he can not complain if the court errs somewhat in the nice adjustment of his rights.

The decree is affirmed.

PEREZ vs. THE STATE.

[INDICTMENT UNDER SECTION 3625 OF REVISED CODE FOR KNOWINGLY SUFFERING A GAME WITH CARDS TO BE PLAYED, &C.]

1. *Section 3625 of Revised Code, indictment under; when bad on demurrer or appeal.*—An indictment under section 3625 of the Revised Code, for knowingly suffering a game with cards to be played at, or in, the places named in said section, or in a “highway or some other place” not named in said section, is fatally defective, either on demurrer or on appeal.

APPEAL from the City Court of Mobile.

Tried before Hon. C. F. MOULTON.

The indictment in this case, which was properly endorsed and returned into court, charged that, before the finding thereof, “Constantine Perez, being the proprietor of a tavern, inn, storehouse for retailing spirituous liquors, or house or place where spirituous liquor was at the time retailed or given away, or at a public house, highway or some other public place, or at an outhouse where people resorted, knowingly suffered a game with cards to be played at such house or place, against the peace and dignity of the State of Alabama.”

No demurrer was interposed to the indictment, but appellant went to trial on a plea of not guilty, was convicted and fined one hundred dollars.

No exceptions were reserved, and the appeal is taken on the record alone.

TURNER, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

PECK, C. J.—The indictment in this case was, as we suppose, intended to be framed under § 3625 of Rev. Code. We know of no other section to which it can be referred; and it is clearly bad, as an indictment under that section. That section declares it to be an offense for any person, being the keeper, proprietor, owner, or superintendent of any tavern, inn, or other public house, or any house where spirituous liquors are sold, retailed, or given away, or of any outhouse where people resort, who knowingly suffers any of the offenses prohibited by the five preceding sections to be committed in his house, or on his premises. Manifestly, the house or premises in, or on, which it may be charged the prohibited offense was knowingly suffered to be committed, must be "*his house, or his premises,*" in such sense as gave to the person being the keeper, proprietor, owner, or superintendent thereof, the legal right to have interposed, and prevented the commission of said alleged offense in said house, or on said premises. Now, this indictment charges the appellant with knowingly suffering one of the prohibited offenses to be committed in one or the other of the plans named in said section, *or in a highway, or some other public place*, not named in said section.

Such an indictment is bad, either on demurrer or on appeal. If held to be a good indictment, a person might be convicted and punished for an act, or an alleged omission of a duty, not declared to be an offense by said section, to-wit: for suffering one of the said prohibited offenses to be committed in a highway or some other public place.

Let the judgment of the court below be reversed, and the cause remanded for further proceedings.

MCKINNEY, SURV. PARTNER, *vs.* BENAGH, ADM'R.

[ACTION TO RECOVER SUM DUE FOR ADVANCES, UNDER SECTION 1860 OF REVISED CODE, COMMENCED BY ATTACHMENT.]

1. *Lien for advances; when may be enforced by attachment.*—A lien, created by contract, on the crop and stock of another for “advances” to assist in making the crop, is such a lien as may be enforced by attachment, as in case of attachment for rent.—Rev. Code, §§ 1860, 1858, 2961.
2. *Same; when attachment not dissolved by death of defendant.*—In such a case, the attachment is but process to enforce the lien; and on the death of the defendant in such an attachment suit and the insolvency of his estate, the lien thus existing is not dissolved, as to the property attached subject to the contract lien. The court should enforce such lien by ordering the sale of such property, at the same time judgment is rendered for the debt or demand secured by the lien.

APPEAL from the Circuit Court of Limestone.

Tried before Hon. JAS. S. CLARKE.

The facts are fully stated in the opinion.

WALKER & JONES, for appellant.

———, *contra.*

PETERS, J.—This is an action of assumpsit commenced by attachment for “advances” to a laborer in making a crop, secured by a contract lien. There was a bill of exceptions taken on the trial below. From this it appears that the appellee’s intestate entered into contract in writing with Crenshaw, McKinney & Vasser, partners, of whom the appellant is the survivor, as follows, to-wit:

“The State of Alabama, Limestone county. To all whom these presents may come: Know ye—that I, Samuel R. Wadsworth, of the county of Limestone and State of Alabama, of the first part, in order to make permanent and secure the payment of a certain sum of money, to-wit, one thousand dollars, to me duly paid in the necessary provis-

McKinney, Surviving Partner, v. Benagh, Adm'r.

ions, such as bacon, corn, oats, &c., which said provisions have been advanced and delivered to me by Crenshaw, McKinney & Vasser, merchants, trading and doing business in the town of Athens, county and State aforesaid, under the firm name of Crenshaw, McKinney & Vasser, the receipt of which I hereby acknowledge, and which advances as aforesaid were (by) this party to this obligation obtained to enable him to cultivate and make a crop, and carry on his farming operations for the present year; and which is hereby declared in this obligation to be for the purpose aforesaid, and that the same is hereby obtained in good faith for the purpose of enabling the obligor to make his crop, and that the same was a necessary advance for said purpose. Now, the premises considered, the party of the first part hereby agrees and covenants with the said firm of Crenshaw, McKinney & Vasser aforesaid, for and in consideration of the advances above mentioned, they shall have and hold, and a lien is hereby given by this obligation to them upon the entire crop of every kind raised and made the present year, and also upon the following described property, to-wit: Two bay mare mules, two black mules, one gray mule, one gray horse, two bay horses, one sorrel horse, one black mare, and one gray mare. And power of sale is hereby given in default of payment of said sum, one thousand dollars, out of the proceeds of the crop so made and grown, as well as out of any of the property above mentioned. Witness my hand and seal, this 16th day of June, 1868.

“(Signed) SAM. R. WADSWORTH, [seal.]”

“Witness: P. F. CRENSHAW.”

This obligation was properly acknowledged and recorded as required by law.—Rev. Code, § 1859.

It further appeared, that on the 2d day of December, 1868, McKinney and Vasser, as plaintiffs, sued out an attachment against the estate of said Wadsworth for the sum of \$471.24. Crenshaw had died, and the suit was brought by McKinney and Vasser, as surviving partners. The statement of the cause of action in the complaint is in the

McKinney, Surviving Partner, v. Benagh, Adm'r.

words following, viz: The plaintiffs "claim of defendant the sum of four hundred and seventy-one dollars and twenty-four cents, due from him by account on, to-wit, the 16th day of June, 1868, for merchandise, goods and chattels sold by plaintiffs to defendant on, to-wit, the first day of January, 1868, at his request; which sum of money, with interest thereon, is now due. Said sum of money is secured by lien executed by defendant to plaintiffs on the 16th day of June, 1868."

The attachment thus issued was levied by the sheriff on the following named property of the defendant, said Wadsworth, that is to say: "One wagon, harness, and team of four mules; also, one black mule and one bay mule." This levy was made December 3d, 1868. The attachment was sued out to enforce the plaintiffs' lien arising under the contract above recited. The law authorizing such a proceeding is in the following terms, viz: "Any person having a lien on the crop and stock of another for advances to assist in making the crop, shall have the same rights and remedies to enforce such lien as landlords have in this State for collection of rents."—Rev. Code, § 1860. An attachment may be issued to collect rents and levied on the crop. Rev. Code, §§ 2961, 2962, 2963. After the issuance of the attachment in this case, the defendant, Wadsworth, died, and the suit was revived in the name of said Benagh, as his administrator. On the trial below, the insolvency of Wadsworth's estate was pleaded by the defendant and admitted by the plaintiffs. The defendant also pleaded, "that the death of the defendant Wadsworth dissolved the attachment, and destroyed the lien upon said property, and that the property levied on under said attachment could not be condemned to the satisfaction of said attachment, and that the judgment must be certified to the probate court, which plea is sustained by the court and the jury charged accordingly." Then a jury came and assessed the damages. Their finding and verdict is as follows: "We, the jury, find the property levied on under said attachment not condemned to the satisfaction of the same, and assess the plaintiffs' damages at the sum of five hundred, sixty-nine

and 75-100 dollars, and that this judgment be certified to the probate court." Upon this verdict the court entered judgment in these words: "It is therefore considered by the court that the plaintiffs recover against said defendant their damages aforesaid, in manner and form aforesaid assessed by the jury, besides the costs in this behalf expended, and that this be certified to the probate court of Limestone county for allowance."

It appears, also, from the bill of exceptions, that "it was admitted on the trial that the property levied on under the attachment is a part of the property mentioned and described in said lien." Upon this evidence, the court charged the jury, at the request of the defendant, "that the death of said defendant dissolved said attachment and destroyed the lien upon said property, and that the property levied on under said attachment could not be condemned to the satisfaction of said attachment." This charge was excepted to by the plaintiffs, and made a part of the record by bill of exceptions. The charge thus given and excepted to is the only error assigned by the appellant in this court.

I have set out the proceedings in the court below somewhat at length, because the case seems to be wholly new in our courts. On first examination of the questions arising in this cause, I was inclined to think that the only issues that could be made on the complaint were the issue of insolvency of the defendant's estate, and such issues as might be presented in answer to an action of assumpsit. Consequently no question could properly arise upon the lien growing out of the contract of the 16th day of June, 1868, or the levy of the attachment upon the property held under that contract. But on a more careful examination of the statute upon which this proceeding depends, it is obvious that the lien of the contract to make advances may become involved as a matter of inquiry in this suit, or in some other which would comprehend the identical same question. In whatever *forum* the matters involved may be litigated, there must be a debt for advances to make crops, and there must be lien by contract to secure the payment

McKinney, Surviving Partner, v. Benagh, Adm'r.

for advances so made. The lien for payment can be enforced at law by attachment.—Revised Code, §§ 2961, 2962, 2963. And the remedy for the collection of rent is the same as that provided for the enforcement of the lien by contract for advancements to farmers and laborers. The court, in the former case, to justify this mode of exercising its jurisdiction, must be satisfied that the suit is for a rent debt in case of rent; and for a debt for advances to make crops, in case the suit is for a debt of that sort secured by a contract lien. The issues here were accepted as presented, without objection. They were, then, not improperly allowed.

The learned judge of the circuit court, in his charge to the jury, took this view of the statute, and made up the issues in a proper way, so as to settle the question both of debt and lien under the contract for advances to make the crop. But he failed to note the distinction between a lien by *law*, and a lien by *contract*. The former is dissolved by the death of the defendant and the insolvency of his estate.—*Lamar v. Gunter*, 39 Ala. 324; *Hale v. Cummings*, 3 Ala. 398. But this is not the case in the latter instance, where the lien grows out of contract, and the attachment is resorted to only as a means to enforce the lien, and does not create it. The lien in this case is a security for the payment of the debt contracted for advances to make the crop. It is a lien not of law, but of contract, and the attachment is a mode provided by law to enforce it. To dissolve the lien in such a case would be to violate the obligation of the defendant's contract. This is not permitted. The learned judge, then, erred in his charge, and for this error the judgment must be reversed and the cause remanded.

But it is well to add that the judgment should be for the amount of the damages assessed by the jury in favor of the plaintiffs, together with costs; and the estate of the defendant having been declared insolvent, the court should order that no execution issue on such judgment, but that the same be certified to the probate court of said county of Limestone, as required by law.—Revised Code, § 2209.

Summerhill v. Trapp.

The court should also order that the property so attached and liable under said contract lien for advances to make the crop, should be sold by the proper officer and the proceeds of said sale applied to the satisfaction of said judgment, and the balance, if any, paid over to the administrator of the estate of said Wadsworth, deceased. This order may be executed by writ of *venditio exponas*, as in case of goods levied on and remaining in the hands of the officer unsold.—Rev. Code, § 2868. And if the property attached has been replevied by the defendant, then the court will proceed upon the replevy bond as in like cases of attachment.—Rev. Code, § 2964; *Mitchell v. Ingram*, 33 Ala. 395. This opinion is confined to the facts set out in the record.

The judgment of the court below is reversed, and the cause remanded for a new trial.

SUMMERHILL vs. TRAPP.

[APPEAL FROM JUDGMENT ON PETITION OF SUPERSEDEAS, &C.]

1. *Supersedeas, petition for, praying quashing of execution; what should contain.*—A petition, praying to have an execution quashed, should be accompanied by a copy of the execution complained of, or it should contain an accurate description of it, else the petition is bad for uncertainty.
2. *Satisfaction of judgment; what act does not amount to.*—A mere levy of an execution by the sheriff on property of the defendant, sufficient in value to satisfy it, is not a satisfaction of the judgment, when the levy is released or abandoned without the concurrence of the plaintiff.
3. *Same.*—The execution must be paid, or its payment defeated by the misconduct of the plaintiff before a surety can complain.

APPEAL from the Circuit Court of Lauderdale.

Tried before Hon. W. J. HARALSON.

The facts are sufficiently stated in the opinion.

O'NEAL & WARD, for appellant.

McFARLAND, *contra*.

PETERS, J.—This is a proceeding by petition for *superseatas*, with a prayer that the “matters and things alleged” in the petition “may be heard,” and a certain writ of execution referred to in said petition “be quashed.”

The petition shows that William Trapp, on the 12th day of March, 1860, recovered judgment in the circuit court of Limestone county in this State, against Ira Arnold and petitioner, Horace Summerhill, for \$161, debt and costs. In this judgment, Summerhill was the surety of Arnold. After this judgment was so rendered, petitioner procured the sheriff to make a levy on property of Arnold which was amply sufficient to satisfy said judgment. But after this, said Arnold, on the 20th day of August, 1861, took an appeal from said judgment to the supreme court, and gave bond in said appeal with sufficient surety. The transcript of the record in this appeal was never filed in the supreme court, and the appeal seems finally to have been abandoned. And Trapp did not apply in the supreme court to have said judgment affirmed on certificate, but he had let the matter rest until an execution, lately issued on his said judgment, had been levied on the lands of petitioner, and the sheriff would sell the same unless restrained. There was a demurrer to the petition; the demurrer was sustained, and the petition dismissed. This judgment of dismissal is the error assigned in this court.

The petition does not seek an entry of satisfaction of the judgment recited in it. It only seeks to quash the writ; that is, to deal with the execution only. When this is the case, the petition ought to be accompanied with a copy of the execution sought to be quashed, or it ought to contain an accurate description of it. But in this, the pleading wholly fails. It merely refers to the writ complained of, as an “execution,” without any description or means of identification whatever. This makes the petition, as a declaration, bad for uncertainty. Besides, the facts relied on to justify the relief asked do not show any fault on the part

Tillman v. Reynolds.

of Trapp, the plaintiff in the judgment. He did not release the levy, or direct or cause it to be released. A mere levy is not a satisfaction of the judgment, when it is released without concurrence of the plaintiff. This does not pay the debt, or defeat its payment by the misconduct of the plaintiff. One of these must occur before a defendant occupying the condition of a surety can complain.—*Henderson, Adm'r, v. Huey et al.*, 45 Ala. 275; *David v. Malone*, June term, 1872.

The allegations of the petition are wholly insufficient.

The judgment of the court below is affirmed.

TILLMAN *vs.* REYNOLDS.

[APPEAL FROM ORDER DISMISSING SUIT, &C.]

1. *Dismissal of suit; when not erroneous.*—It is not error for the court to dismiss a suit on proof that the debt sued for has been paid, and that the plaintiff has agreed and consented to the dismissal.
2. *Attorney's lien; to what does not entitle attorney.*—The attorney's right of lien, when he has such lien, on a promissory note in his hands for collection, gives him no right to a judgment (in a suit between the client and the defendant) against the defendant for the amount of his fees, after the debt has been paid by the defendant to the plaintiff, either in the name of his client or in his own name, even if the plaintiff be insolvent.
3. *Cause submitted by consent, without assignment of error; will be affirmed.*—A cause in this court, "submitted by consent," without any assignment of error, or argument or brief filed for appellant, will be affirmed.

APPEAL from the Circuit Court of Barbour,
Tried before the Hon. J. McCaleb Wiley.

The opinion states the facts.

W. C. OATES, for appellant.

SEALS & WOOD, *contra*.

PETERS, J.—This is an appeal from Barbour circuit court. But there is no assignment of errors, and no briefs filed by any party to the record or by their attorneys. I suppose the question intended to be raised in the case, is the attorney's right of lien on the note which is the cause of action in the original suit. The record shows that Mrs. Tillman instituted suit in Barbour county circuit court, on the 28th day of September, 1868, against John A. Reynolds, on a promissory note for \$553. The summons in this suit was regularly served upon the defendant, Reynolds, on the 28th day of October, 1868; and afterwards, at the August term of said circuit court, which was a special term thereof, in the year 1871, the following judgment was entered by the court in this cause :

“Zilpha Tillman vs. J. A. Reynolds.	}	August 22d, 1871. Came the plaintiff by attorney, and makes known to the court, that she will dismiss this suit. It is therefore considered by the court, that this case be dismissed, and that the defendant go hence and recover of the plaintiff the costs in this behalf expended, for which execution may issue.”
---	---	--

On the same day this judgment of dismissal bears date, there was a bill of exceptions filed in this suit, from which it appears that “on the trial” of this cause in the circuit court, “on the 22d day of August, 1871,” “the defendant pleaded that since the commencement of said action, he had paid the plaintiff her said debt or demand *in full*, and exhibited in evidence, without objection, the *receipt* of the plaintiff, showing that he had paid said debt.” In this receipt the plaintiff bound herself to dismiss her suit. It was also admitted, that the attorney who had brought the suit for Mrs. Tillman, at her instance, had the note on which the action was founded in possession, and that he had not received any pay or compensation for his services in bringing the suit and attending to the same; that his services were reasonably worth one hundred dollars, and that “he had a claim or lien on said note for his fees or commissions for his services aforesaid, and that the settle-

ment between the plaintiff and defendant was without his knowledge or consent." It was also admitted that the plaintiff was insolvent. Upon these facts the attorney for the plaintiff insisted upon a judgment against the defendant "for the amount of his fees." The court, upon this proof, at the request of the defendant, charged the jury, "that if they believed the evidence, they must find for the defendant;" to which "the plaintiff and her attorney" "jointly and severally excepted and took a non-suit," and "tendered their bill of exceptions," &c. The said plaintiff and her attorney bring this cause to this court by appeal. There was no judgment of non-suit entered in the court below, but only the judgment of dismissal as above. It is presumed that the purpose of the proceeding in the court below, was to compel the defendant to pay the plaintiff's attorney's fee for instituting the suit, out of the plaintiff's debt in his hands, before he paid the plaintiff the amount of the note in suit, or to make him liable for the fee, if he failed or refused to do so; because the attorney had a "claim or lien" on the note in his possession, and the plaintiff herself was insolvent. In such a case as this, such a principle would make the defendant, in the event the plaintiff was entitled to a judgment at least to the amount of the fee due the attorney for the institution of the suit, security of the plaintiff for the payment of the fee. I am not aware of any principle governing the relation of client and attorney that goes so far. The defendant's liability is discharged when he pays the debt he owes to the plaintiff. And whether this be done before or after the institution of the suit, its effect is the same, except as to costs of suit. Payment of the debt in suit, in either instance, is a good defense. If the payment is made before action brought, it is a good plea in bar of the action and the costs; if it is made after action brought and before judgment, it is also a good plea in bar of the action, except costs up to the plea pleaded, as a plea *puis darrien continuance*.—1 Chitt. Pl. 657-8, marg.; 7 Bac. Abr. (Bouv.) p. 685; Rev. Code, §§ 2651, 2685. The proofs in this case show that the debt had been paid before the trial, but after suit brought. This

Johnson, Adm'r, v. Crutcher.

being admitted, the court was bound to charge the jury to find for the defendant. Besides, the attorney for the plaintiff is not a party to the record in the court below. No judgment could be rendered in his favor, except a judgment by confession. His lien, when he has a lien, can not be enforced in this way by an involuntary judgment against the defendant, in a court of law.—*McCaa v. Grant*, 43 Ala. Rep. 262.

The judgment of the court below is affirmed, with costs,

JOHNSON, ADM'R, vs. CRUTCHER.

[BILL IN EQUITY TO REFORM DEED, &c.]

1. *Deed; when will be reformed, &c.*—A father, after the death of his son leaving a widow and minor children, conveyed by deed to his administrator land which the son had occupied several years under a parol gift, intending to subject it to the claims of his creditors and his wife's dower, in the same manner as if the conveyance had been made before his death, —*Held*, that on a proper bill by the widow, equity will reform the deed, allot the dower, and apportion to the family the statutory provision of five hundred dollars worth of the land.

APPEAL from the Chancery Court of Madison.

Heard before Hon. WM. SKINNER.

The facts are stated in the opinion.

ROBINSON & WALKER, for appellant. ¹

CABANISS & WARD, *contra*.

B. F. SAFFOLD, J.—William Crutcher made a parol gift to his son James, who was a married man with several children, of a tract of land, placing him in possession. James died after several years occupancy of the premises, without having obtained any better title. Some time after

his death, his father executed a conveyance of the land to his administrator, with the intention of subjecting it to his debts and to the dower-right of his widow in the same manner as if he had conveyed it to him prior to his death. But by mistake and misapprehension of himself and the conveyancer, this purpose was not effected, and the deed was nothing more than a simple conveyance to the son's administrator without the expression of any use or trust. The widow of James filed this bill alleging the above facts and praying for a reformation of the deed, an allotment of her dower in the land, and a reservation of five hundred dollars worth of it for the family. William Crutcher and the administrator of James were made defendants. The proof was in exact correspondence with the allegations, and the chancellor decreed the relief sought. During the pendency of these proceedings James Crutcher's estate was declared insolvent.

The jurisdiction of chancery in the allotment of dower is not taken away by the statutory jurisdiction conferred on the probate court.—*Owen v. Slatter*, 26 Ala. 547.

The reformation of a deed is only cognizable in equity, and that court will always grant relief when the mistake or other ground is clearly shown, and there will be no prejudice to rights acquired by others through the laches of the of the applicant.—*Whitehead v. Brown*, 18 Ala. 682; *Stone v. Hale*, 17 Ala. 557.

This is clearly a case where the power of reformation ought to be exerted. The mistake is proved beyond question, and there is no possibility of injury to the rights of any one.

The decree is affirmed.

RYAN *vs.* GROSS.

[ACTION ON ACCOUNT, &C.]

1. *Account stated; what necessary to recover on.*—To enable a plaintiff to recover on a count upon an account stated, he must prove, either an actual accounting together, or—what the law holds to be equivalent—an admission by the defendant, expressed or clearly implied, that a fixed certain sum is due to the plaintiff by the party making the admission.
2. *Same; what admissions will not change an open account to an account stated.* If, when an account for goods sold is presented for payment, or to be settled by note, the party does not dispute or deny, but admits, the correctness of the items, but does deny his liability to pay, and refuses to pay or to settle the account by note, and insists that some other person is justly chargeable with and ought to pay the same; this will not change the character of the account from an open to an account stated, and thereby defeat the defense of the statute of limitations of three years.

APPEAL from the Circuit Court of Jackson.

Tried before Hon. W. J. HARALSON.

This action was brought by the appellee Gross, against the appellant Caroline Ryan, on the 8th of March, 1868. The complaint contained two counts. The first count was a count upon an account stated between plaintiff and defendant, for an indebtedness incurred by defendant when a *femme sole*, under the name of Caroline Frazier, and before her marriage with her present husband. The second count was based on an open account for the same indebtedness. Both counts are silent as to the time when the account was stated, or when the original indebtedness accrued. No pleas appear in the record.

It appears from the bill of exceptions, that prior to November, 1857, the appellant was the wife of Joseph P. Frazier. Frazier died in November, 1857, and his widow, in December, 1858, married her present husband, John Ryan. Appellee was a dry-goods merchant, residing in the same town with appellant, and the accounts with him, which were

the foundation of the action; were contracted in the interval of time between the death of Frazier and the intermarriage of appellant with Ryan. Most of the articles itemized in the accounts, which were made out for each year, were for dry-goods for the use of the appellant, although some of the articles furnished were really for the use of the minor children of Frazier, who resided with their mother after Frazier's death, his estate having been kept together, (for some reason not disclosed), and no assignment of dower or allotment of her distributive share having been made to appellant until after her marriage with Ryan. The proof, although conflicting, strongly tended to show that the credit was given to Mrs. Frazier individually, and not to Frazier's administrator.

The last item of the account which the appellee proved was dated November 17, 1859, and hence an action upon it, as upon an open account, was barred by the statute of limitation of three years. To take the account out of the influence of that statute, the appellee offered testimony to show that the original accounts had become an account stated. Gross was examined as a witness in his own behalf, and testified that in 1863 he sent the account, proved on the trial to be correct, to defendant and her husband by mail, with the request that they would execute their note for it; that by the next mail, or the one succeeding it, defendant and her husband returned said account, declining to give a note therefor, not denying or disputing the correctness of the items of the account, but insisting that the defendant was not liable thereon, but that the account should be paid by the administrator of Frazier's estate. Appellee further testified, that some time in 1866 he called on defendant and her husband to pay said account, or to close it by note, and that defendant and her husband, not denying the correctness of the items of said account, insisted that the defendant was not liable therefor, but that the administrator of her former husband's estate should pay the account, as it was justly chargeable against the estate, and again refused to pay said account or to give a note therefor.

Ryan v. Gross.

The defendant and her husband were both examined, but their testimony was not materially variant from that of the appellee. Mrs. Ryan testified that the account was returned to the plaintiff by the next mail after it was received, with a refusal to close it by note or to pay it, because she did not believe she was liable for or ought to pay the said account, but believed, and so informed appellee, that the estate of her former husband was liable for and ought to pay the same; that she never examined said account, and had never distrusted or denied the correctness of the items thereof, but had always denied that she was liable to pay it, but insisted that the estate of her former husband was bound for it.

This is, in substance, all the testimony adduced which is in any way material to an understanding of the points decided.

The court charged the jury, "that if defendant by herself, or upon orders given by her, purchased goods charged in said accounts to her on her individual credit, and not on the credit of the estate of her deceased husband, although some of the goods purchased were not for her individual use, but were for the use of her minor children, and for the use of the family and plantation of her said former husband, and notwithstanding the estate of her said former husband was being kept together by his administrator, defendant was liable to plaintiff for such accounts; and if in 1863, plaintiff sent said accounts to defendant, who returned them to plaintiff, not disputing or denying the correctness of the items thereof, but admitting the same, and denying her liability therefor, and insisting the estate of her former husband was liable therefor,—then such a denial of liability was a denial of matter of law only, and her admission of the correctness of the items of the said account would be an admission making the accounts a stated account, on which suit could be brought within six years."

The defendant excepted to the giving of this charge, and requested the court to give the following written charges:

1st. "To constitute an admission of the correctness of this account, which will convert it into a stated account,

there must not only be admission that the goods charged were sold and delivered, but something from which the jury can reasonably infer that the defendant assented or intended to assent to her obligation to pay the account. If such admission is accompanied with the declaration that the defendant is not liable for the payment of the account, but some one else is liable therefor, the account does not become a stated account."

2d. "That if the accounts were sent to the defendant, and by her or by her and her husband returned to the plaintiff by the first or next mail after they were received, without any denial or dispute as to the fact that the goods charged in said account were sold and delivered by the plaintiff, but with the statement that defendant was not liable for said account, and that the administrator of Frazier, deceased, or the estate of said Frazier, deceased, was liable for the payment thereof,—then these facts will not constitute the accounts a stated account; and notwithstanding these facts the accounts are open accounts barred by the statute of limitations of three years."

The court refused to give either of these charges, and the defendant excepted. The charge given, and the refusal to give the charges requested, are now assigned as error.

WALKER & BRICKELL, for appellant.

ROBINSON & WALKER, *contra*.

PECK, C. J.—1. The material and only real question in this case is, as to the character of the account, the foundation of the appellee's action in the court below. If not an account stated, then the action was barred by the statute of limitations of three years.

Mr. Chitty says: "The present rule is, that if a fixed and certain sum is admitted to be due to a plaintiff, for which an action would lie, that will be evidence to support a count upon an account stated."—1 Ch. Pl. 358, 14 Am. ed. from 6th London ed., corrected and enlarged.

In *Knowles et al. v. Michael et al.*, (13 East. 133,) Lord Ellenborough, C. J., says: "If there were an acknowledg-

Ryan v. Gross.

ment by the defendant of a debt due upon any account, it was sufficient to enable the plaintiff to recover upon the count, for an account stated."

In 2 Greenl. Ev. § 126, it is said: "In support of the count upon an *account stated*, the plaintiff must show there was a demand on his side, which was acceded to by the defendant. There must be a fixed and certain sum admitted to be due; but the sum need not be precisely proved as laid in the declaration." Again: "The admission itself must be voluntary, and *not qualified*. But it need not be express and in terms; for, if the account be sent to the debtor in a letter, which is received but not replied to in a reasonable time, the acquiescence of the party is taken as an admission that the account is truly stated."—See, also, *Langdon et al. v. Roane's Adm'r*, 6 Ala. 527.

A recovery on a count upon an account stated can only be had when a certain and precise sum is admitted to be due; an acknowledgment of a debt, but without naming or referring to a sum certain, will not enable a plaintiff to recover on this count, even nominal damages.—1 Ch. Pl. 359.

The original form or evidence of the debt is of no importance, under the count upon an account stated; for the stating of the account alters the character of the debt, and is in the nature of a new promise or undertaking. If the original debt be an account for goods sold, the items need not be proved; for the action is not founded upon them, but upon the defendant's assent to the sum ascertained to be due.—2 Greenl. Ev. § 127. In other words, the action is not founded upon the original liability, but upon the new promise, which may be either expressed or implied. It is not even necessary that the original demand should be a legal demand, recoverable at law; it may be of an equitable nature only.—Ch. on Contr. 648, *a*.

2. Taking these principles and authorities as our guide, we are led to the conclusion that the evidence of the plaintiff himself, who was examined as a witness in his own behalf, fails to show that the account exhibited and made a part of the bill of exceptions can be regarded as an account stated.

No fixed or certain sum was at any time admitted by the defendant to be due to the plaintiff. The account, when presented, was not acceded to by the defendant, nor was there any acknowledgment by her that she owed the plaintiff any thing, but a persistent denial, from the beginning, that she was liable to pay said account or any part of it. There was clearly no admission by defendant that she was indebted to the plaintiff for any fixed or certain sum, or for any sum whatever, but a prompt denial that she owed him any thing.

The most that can be said of this evidence is, that defendant did not, in so many words, deny or dispute that the items of said account were correctly stated, but it was a clear denial that she was liable to pay it, and a refusal on her part in any wise to settle it. This evidence was insufficient to change the character of said account from that of an ordinary account for goods sold to an account stated. To constitute an account stated, it must receive the assent of both parties.—*Carlisle v. Davis*, 9 Ala. 858. A certain fixed sum must be admitted by the defendant to be due to the plaintiff.—1 Ch. Pl. 358. It is not sufficient for the plaintiff to show that there was a demand on his side, but he must also prove it was acceded to by the defendant, otherwise it would be considered to be an account stated.—1 Greenl. Ev. § 126, *supra*.

The defendant and her husband were examined as witnesses, but their version of the matter was not materially different from that given of it by the plaintiff. The evidence of the defendant perhaps might be sufficient to enable the plaintiff to recover on the common count for goods sold, if the statute of limitations were out of the way; that, however, is not the question to be decided in this case. The statute of limitations is relied upon by the defendant, and the plaintiff seeks to avoid this defense, and says the evidence shows that the account was changed from an open, to an account stated, which is only barred by the statute of six years.

3. From what has been said in this opinion, it is readily seen that the charge given by the court is erroneous. It

Harkins et al. v. Bailey et al.

improperly instructs the jury, that the mere admission of the defendant that the items of the account were correct, although accompanied with a denial that she was liable to pay the same, was sufficient to make said account an account stated; and that suit could be brought upon it within six years. To enable a plaintiff to recover on a count upon an account stated, he must prove, either an actual accounting together, or—what the law holds to be equivalent—an admission by the defendant, expressed or clearly implied, that a fixed certain sum is due to the plaintiff.

The charges asked by the defendant, and refused by the court, are consistent with this opinion, and should have been given.

Let the judgment be reversed, and the cause remanded for another trial. The appellee will pay the costs.

HARKINS ET AL. vs. BAILEY ET AL.

[BILL IN EQUITY TO HAVE DEED DECLARED FRAUDULENT, &C., OR TO HAVE IT DECLARED A GENERAL ASSIGNMENT.]

- Property; sale of.*—1. The owner of property, whether real or personal, may sell it to another person able and competent to buy it, if such sale is not made with fraudulent intent.
2. *Same; insolvency of owner, when does not invalidate.*—Though the owner of property may be insolvent, and largely indebted at the time, he may make a *fair* sale of his property to a relation, if the sale be made without fraud. These, though badges of fraud, are not conclusive proof of it. (*Crawford v. Kirksey*, June term, 1872.)
3. *Decree of chancellor; when will not be disturbed.*—When the chancellor's decree is not repugnant to the preponderance of the evidence, it will not be disturbed.
4. *Absolute sale; when will not be treated as general assignment.*—An absolute sale of land by a debtor to his creditor in payment of a subsisting debt, when made in good faith and without fraud, can not be treated as a general assignment, unless the proof clearly shows that it was so intended.

APPEAL from the Chancery Court of Lauderdale.

Heard before Hon. WM. SKINNER.

The opinion states the case.

WOOD & O'NEAL, for appellant.

PICKETT & JONES, *contra*.

PETERS, J.—This is a suit in equity. The object of the bill is to set aside a deed to certain lands in the county of Lauderdale in this State, made by Bailey to Sledge, on account of fraud, or to have the same declared a general assignment, for the benefit of all the creditors of the grantor. The bill was amended, and the case was submitted for final decree on the bill as amended, the answers of the defendants, the exhibits and proofs. The learned chancellor rendered his decree in favor of the defendants in the court below, and dismissed the bill, with costs. From this decree the complainants bring the case here and assign this decree as error.

There was a demurrer to the original bill before its amendment, because the suit had been commenced in an improper district, but the amended bill obviated this objection, by introducing a party to the proceedings who was a material defendant and resident in the district in which the bill was filed. This was sufficient.—Revised Code, §§ 3326, 3356.

The question, then, turns upon the merits of the case as presented by the pleadings and the proofs. It is admitted that the complainants in the court below are *bona fide* creditors of said James J. Bailey, and that said Bailey, being indebted to said creditors, on the 20th or 15th day of August, in the year 1865, executed a deed to certain lands to William H. Sledge, who was his brother-in-law. Bailey's wife joined him in said deed. The consideration mentioned in this deed is "forty-two hundred dollars, cash in hand paid" by Sledge to Bailey. The deed is made an exhibit to the bill. It is in form an absolute sale of the

lands mentioned therein by Bailey and wife to Sledge. It is alleged in the bill that this "was made for the purpose of delaying, hindering and defrauding the complainants and other existing creditors of said James J. Bailey, and that it is fraudulent and void; and if mistaken in that, then they (complainants) say it was a general assignment of substantially the whole of the property of the said James J. Bailey to said Sledge, by which a preference is given by said James J. Bailey to said Sledge over the remaining creditors of said grantor." If either of these alternative allegations are true, then the decree of the learned chancellor in the court below can not be sustained.—Rev. Code, §§ 1865, 1867. Then, the only questions presented in either aspect of the case, are questions of fact. There were no objections to the testimony in the court below, and none urged or suggested here. Then, did the chancellor err in his estimate of the testimony in settling his decree? As a principle of law, there can be no doubt that the owner of property, real or personal, in this State, may make a fair sale of it to any person able and competent to buy it, and if such sale is not made with fraudulent intent, it is not void. Chancellor Kent, speaking of the right of the owner to sell his property to another, says: "The power of alienation of property is a necessary incident to the right of property, and was dictated by mutual convenience and mutual wants."—2 Kent, 326–7 (marg.); *Crawford et al. v. Kirksey et al.*, June term, 1872; 8 Wheaton, 242. One's debts in this State are not a charge or lien upon his estate, until after his death.—Rev. Code, § 2060. Therefore, although he may be insolvent, or largely indebted at the time, he may alienate the same by absolute sale; and although the sale may be to a relation, this does not avoid the sale, if it is fair and made without fraud.—*Crawford v. Kirksey*, *supra*. These are but badges of fraud, and not conclusive proof of it. If the owner of property may sell it, he may fix the terms of the sale. He may sell it for money, or he may sell it to pay a subsisting debt, if the sale is fairly and honestly made. The answers of the defendants flatly and fully deny all fraud, or intent or design

to hinder, delay or defraud the creditors of Bailey. The weight of the evidence of the witnesses who know the facts directly and fully sustains these denials. It has been repeatedly settled by this court, that when the chancellor's decree is not clearly repugnant to the preponderance of the evidence, it will not be disturbed.—39 Ala. 63; *Turlington v. Mabry*, June term, 1872; *Goodwin v. Nance*, *ib.*; *Milligan v. Brackin*, *ibid.*; 27 Ala. 267, 272; 41 Ala. 626. So far, then, as this aspect of the case is involved, there is no error in the judgment of the court below. It is sustained by the proofs.

It has already been shown that the deed by Bailey and wife to Sledge, of the 20th or 15th day of August, 1865, was an absolute sale on its face. There is no proof to show that it is different from what it purports to be. The terms "general assignment," used in our statute, are not intended to include an absolute sale by a debtor to his creditor to pay a subsisting debt. This would deny to the debtor the right to sell his property at all, if he owed any debts, save that for which the property was sold. The language of the Code is this: "Every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors, over the remaining creditors of the grantor, shall be and enure to the benefit of all the creditors of the grantor equally."—Rev. Code, § 1867. This language keeps up the distinction between a sale and an assignment for special purposes, between an assignee and a purchaser. And this distinction can not be dispensed with, without making an insolvent's debts a lien upon his estate and subjecting it to their payment. If it is disregarded, it paralyzes and suspends the insolvent's power of disposition over his property, with scarcely less completeness than death itself.—Revised Code, § 2060. This distinction has been observed by courts in other sections of the Union, where similar expressions have been used in similar statutes.—*United States v. McLellan*, 3 Sum. 343, 355; *Dias v. Bouchaud*, 10 Paige Ch. 445, 461; *Norton v. Cobb & Crawford*, 20 Geo. 44, 47. There is no proof that shows that the deed by Bailey to Sledge was not what it purports to

Leggett et al. v. Bennett, Ex'r, et al.

be, an absolute sale. The decree of the chancellor conforms to this construction of the transactions between Bailey and Sledge, as the same are shown by the proofs. In this aspect of the case, it is also free from error.

The decree of the court below is, therefore, affirmed, with costs.

LEGGETT ET AL. *vs.* BENNETT, EX'R, ET AL.

[BILL IN EQUITY SEEKING TO RECOVER OF SURETIES OF ADMINISTRATOR OF COMPLAINANTS' FATHER'S ESTATE, AND ALSO OF SURETIES OF SAME PERSON IN ADMINISTRATION OF COMPLAINANTS' GRAND-FATHER'S ESTATE, WHICH WAS INDEBTED TO FIRST ESTATE, THE AMOUNT DUE THE FATHER'S ESTATE BY THE ADMINISTRATOR, &C.]

Where, in equity, the complainants charged that, as heirs of their father, they were entitled to certain property left by him at his death, and to other property ascertained to be his by a decree of the probate court, after his death, on the final settlement and distribution of his father's estate, which his administrator, who was also the acting administrator of the other estate, retained by direction of the court, and sought to recover the same from the sureties of the administrators of both estates, who were alleged to have died insolvent,—*Held*, 1st. That the sureties of the administrators of the grand-father's estate were improperly made defendants, because no liability was shown against them.

2. That an amendment of the bill, showing that the administrator of the administrator of the father's estate had received all of the assets with which his intestate was chargeable, and had settled his accounts in the probate court, where a decree for the balance unadministered was rendered against him, without an averment of some other reason why the complainants still had recourse against the sureties of the administrator of the father's estate, destroyed the case against the said sureties.
3. Amendments which would divest a bill of all of its original defendants, and make a new case against new defendants, can not be allowed.

APPEAL from the Chancery Court of Barbour and Henry.
 Heard before Hon. ADAM C. FELDER.

The opinion sufficiently states the facts.

J. A. CORBITT, for appellant.

OATES & CLENDENNIN, *contra*.

B. F. SAFFOLD, J.—The appellants, as complainants, alleged that as the heirs of their father, Marlin Nall, they were entitled to certain property of which he died seized and possessed; and to certain other property which was ascertained, after his death, to be due to his estate, by a decree of the probate court, on the final settlement and distribution of the estate of his father, William Nall. That his administrator, Floyd Nall, who was also the acting administrator of William Nall's estate, was directed by the probate court to retain in his hands this last mentioned property, as that of his estate, which he did.

The administrators of William Nall, and the administrator of Marlin Nall having died insolvent, as is charged, the bill sought the recovery of all the property above mentioned from their respective sureties. Those who survive, and the representatives of those who had died, were made defendants. The bill was demurred to for want of equity, misjoinder of parties defendant, and multifariousness. It was dismissed on demurrer without prejudice.

Of these defendants, Floyd Nall, as the administrator of Marlin Nall, and his sureties, were alone responsible for that portion of the property which his intestate died seized and possessed of. If, as the bill alleges, there was a final settlement and distribution of the estate of William Nall, and the distributive share of Marlin therein became chargeable to Floyd Nall, as his administrator, then he and his sureties were alone responsible for it; and no liability is shown against the sureties for the administration of William Nall's estate. There was a misjoinder of parties defendant.

The misjoinder of parties as defendants can only be taken advantage of by those who should not have been made parties.—Story's Eq. Plead. § 544; *Horton v. Sledge*, 29 Ala. 478. The effect of the objection, when sustained,

is the dismissal of the bill as to them. The bill is not multifarious for containing two distinct subject matters. To constitute multifariousness in this respect, both subjects must be capable of redress by a court of equity.—Story's Eq. Plead. § 283. There is simply no case against the sureties for the administration of the estate of William Nall.

The answers of the sureties for the administration of Marlin Nall's estate developed, that after the death of their principal, the administration was committed to Thomas Armstrong, and that Thomas Gray became the administrator of Floyd Nall, and settled his administration of Marlin Nall's estate in the probate court, where a decree was rendered against him which he paid to the said Armstrong. These facts were shown by a transcript of the record, and the receipt of Armstrong, appended to the answers as exhibits.

After the court had sustained the demurrers to the original bill, the complainants amended it by striking out the sureties of the administrators of William Nall as defendants; making Gray and Armstrong defendants in their official capacities, and appending an exhibit of the facts above stated, except the receipt of Armstrong to Gray, and by praying for a settlement of Marlin Nall's estate. The sureties of Floyd Nall assigned like grounds of demurrer to the amended bill, which the court sustained. The objection of misjoinder of parties defendant was well taken, because, now, the bill averred that Gray, having received all the assets with which his intestate was chargeable, had settled Floyd Nall's administration of Marlin Nall's estate in the probate court, and had become personally responsible for the amount of the decree rendered against him, without an averment that he was insolvent, or that there was any error in the settlement, or of any cause why the complainants still had recourse against the sureties of Floyd Nall.

The bill was now divested of all of its original defendants, and had become a new suit against new parties. It could not be maintained as such. Amendments to a bill

Doe, ex dem. Wilkerson, v. McDougal.

must be consistent with the original.—1 Dan. Ch. Plead. & Prac. m. p. 454, note 2; *Lyon v. Tallmadge*, 1 Johns. Ch. Rep. 184.

The decree is affirmed.

DOE, EX DEM. WILKERSON, vs. McDOUGAL.

[EJECTMENT.]

1. *Ejectment, action of; by what law governed.*—An action of ejectment commenced in 1852 is governed by the law of that action as it existed under Clay's Digest. Such an action should be conducted as at common law, except the fictitious proceedings are abolished.
2. *Same; proceedings in, as to declaration, &c.*—In such an action, the tenant in possession, who is the real defendant, on being served with a copy of the declaration and notice, is required, under the consent rule, to confess lease, entry and ouster, and put in his plea of not guilty and insist upon his title only: after this, he can not demur to the declaration. If the declaration is insufficient, it should be set aside and amended.
3. *Ejectment; what title plaintiff must have to entitle to recovery.*—When this form of action is instituted for the recovery of a term for years, the plaintiff must have a good title as against the defendant, both when the action is commenced and when it is tried, or else he can not recover.
4. *Cause submitted without argument or brief; when errors assigned will be considered abandoned.*—When a cause is submitted "by consent" without argument, and no brief is furnished the court by the appellant in support of the assignment of errors, it will be presumed that the assignment of errors is not insisted on, and this court will not feel bound to consider them.

APPEAL from the Circuit Court of Russell.
Tried before Hon. LITTLEBERRY STRANGE.

The opinion states the facts.

HOOPER, for appellant.

DAVID CLOPTON, *contra*.

Doe, ex dem. Wilkerson, v. McDougal.

PETERS, J.—This is an action of ejectment commenced on the *eleventh* day of March, in the year 1852; and a copy of the declaration and notice was served upon the tenant in possession on the *eighteenth* day of March in the same year. This was before the adoption of the Code. Consequently, the law which governs such a suit is found in Clay's Digest of the Laws of Alabama. By this law, the fictitious proceedings in the action of ejectment are abolished.—Clay's Dig. p. 320, § 43. In this compilation of our statutes it was prescribed that, "in all cases where the action of trespass to try titles would, under the present laws, be the proper action, the plaintiff, at his election, shall have either the said action of trespass to try titles, or the action of *ejectment*; and when the action of ejectment shall be brought, it shall be lawful, and shall be the duty of the jury trying the same, to assess the damages in favor of the real plaintiff, as in actions of trespass to try titles."—Clay's Dig. p. 320, §§ 46, 43, 44. The action referred to in these sections of the law as an action of ejectment is that action as at common law, with the fictitious proceedings abolished. That is, the real plaintiff and the real defendant take the places of the fictitious parties, and the action proceeds in other respects as it did before. The form of the pleadings in this case is that adopted at common law. The declaration here pursues the form given in the books of credited authority on matters of pleadings.—2 Chit. Plead. pp. 877, 878. In such case, at common law or under the English practice modelled on the common law, it is required that the declaration and notice of suit shall be served on the casual ejector. And if the tenant in possession chooses to appear pursuant to the notice and defend, a rule of court is entered, by consent of parties, by which it is ordered that the tenant in possession be made defendant instead of the casual ejector, and receive a declaration in an action of trespass and ejectment for the premises sued for, and plead thereto "not guilty;" and upon the trial of this issue such tenant was required to confess lease, entry and ouster, and insist upon his title only.—2 Tidd's Pr. 1203, 1204, *et seq.*

Doe, ex dem. Wilkerson, v. McDougal.

This practice forbids the defendant to demur to the declaration, because the plea of not guilty, having been entered under the consent, it was too late to demur. If the pleadings are irregular or insufficient, they should be set aside and amended.—2 Chit. Pl. 878 and note *t*, and cases cited; 2 Tidd's Prac. 1203, 1204, *et seq.*, *supra*; *Lion, ex dem.*, v. *Eden*, 18 Johns. R. 510. But under our practice, it is presumed, the fictitious parties are dispensed with and the pleadings are conducted in the name of the real plaintiff against the tenant in possession, upon whom the declaration and notice are served. And when thus served with process, the tenant in possession, who is the real defendant, appears and makes defense or permits a judgment to go by default, upon the same terms as at common law; and the action is, thenceforward, conducted in the same way, and the judgment is the same. At common law, under this form of action, when it is instituted for the recovery of a term for years, as is the case here, the plaintiff must have a good title as against the defendant, both when the action is commenced and when it is tried, else he can not recover.—*Burton v. Austin*, 4 Vermt. 105, 107; *Jackson v. McClaskey*, 2 Wend. 541. A destruction or failure of the plaintiff's title after suit brought may be pleaded by plea since the last continuance.—2 Wend. 541, *supra*. Here the several counts of the declaration are upon demises for seven years, commencing in 1850. The case was not tried till 1869; above ten years after these terms had expired. Then, upon the face of the pleadings the plaintiff shows that he has no right to recover. And although the court erred in sustaining the demurrer to the declaration in this form of action, it was error without injury; which is not a ground for reversal.

It may be contended, that as the action was commenced before the expiration of the term, and that the term has failed since action brought, the plaintiff is entitled to recover the damages for detention of the lands and for the rents and profits. Although this seems the extent to which the judgment of the court goes in the case of *Jackson, ex dem.*, v. *Davenport*, (18 Johns. R. 295,) it does not seem to

Ex parte Candee.

be supported by other authorities equally respectable. The plaintiff having elected to bring ejectment, which is an action for the recovery of the possession of the lands in question, he must take that action with its limitations. It is the legal effect of the action of ejectment as it existed under Clay's Digest, that the title being gone, the right to damages went with it; because the recovery of the damages was only an appendage of the recovery of the lands. *Tryson v. Tryson*, 16 Vermt. 313; *Burton v. Austin et al.*, 4 Vermt. 105; 2 Tidd's Pr. 1189, 1190. It is possible that in such a case the more consistent practice is to allow the term to be enlarged, for the purpose of carrying a judgment for the damages and costs.—See Tillinghast's *Adams on Eject.* 216, *et seq.*, and cases cited in the notes. Then the sustaining of the demurrer was not a reversible error in this case.

But besides, this cause was submitted "by consent," without argument. No brief has been furnished by the appellant in support of his assignments of error. When this is the case, it will be presumed that the assignments are not insisted on, and this court will not feel bound to consider them.—*Shaefer v. Sheppard*, June term, 1872; 38 Ala. 318.

Let the judgment of the court below be affirmed.

EX PARTE CANDEE.

[APPLICATION FOR MANDAMUS TO COMPEL PROBATE JUDGE TO APPROVE SHERIFF'S BOND.]

1. *Approval of bond of sheriff; imposes ministerial duty on probate judge.*—The duty of the judges of probate in this State to approve of the official bonds of sheriffs, is a ministerial, and not a judicial duty.
2. *Same; when mandamus will be allowed to compel approval of bond.*—A writ of mandamus is the appropriate remedy to compel judges of probate to approve of such bonds, if made in the form, and for the proper amount,

- and payable and conditioned as required by law, with sufficient sureties, and presented for approval within fifteen days after the election.
3. *Sheriff; office of, what not vacated by.*—The office of a sheriff is not vacated by his failure to file his official bond in the office of the judge of probate of his county, within fifteen days after his election. Such failure may be a cause of forfeiture and vacancy, which may be taken advantage of and enforced by the State, in a proper judicial proceeding for that purpose.
 4. *Office, proceeding to declare forfeiture of; what good defense to.*—In such a proceeding, it is a good defense to show that a sufficient bond was presented within the time prescribed, and that the judge of probate refused to approve of, and file the same in his office, without any legal reason for his refusal.
 5. *Mandamus; proper practice where application for, has been denied in lower court.*—Where an application to show cause why a *mandamus* should not issue has been denied by an inferior court or judge, the petitioner may either take an appeal under the act of the 15th December, 1868, (Pamph. Acts, p. 410,) or he may renew his application to this court, setting forth under oath such a state of the case as shows that the court or judge who made the decision erred to his prejudice, and that he is entitled by the case made before such court or judge to the relief he seeks.
 6. *Same; what practice will be adopted by supreme court to give it control of inferior jurisdictions.*—It is the duty of this court, to enable it to carry out the powers with which the constitution has invested it, of exercising “a general superintendence and control of inferior jurisdictions,” to adopt such course of proceeding as will make its control complete.
 7. *Supreme court; original jurisdiction of, not subject to legislative control.*—The appellate jurisdiction of this court is exercised under such restrictions, not repugnant to the constitution, as may from time to time be prescribed by law; but the legislature has no power to prescribe the mode or manner in which it must exercise its power to issue writs of injunction, *mandamus*, *habeas corpus*, *quo warranto*, and such other remedial and original writs as may be necessary to give it “a general superintendence and control of inferior jurisdictions.”
 8. *Rule to show cause, return to; how treated and what must state.*—On a rule to show cause why a *mandamus* should not issue, the petition is treated as the complaint, and the return to such rule is regarded as the plea, in which the facts stated in the petition must be denied, or such other facts stated as show that petitioner is not entitled to the relief he seeks; and such facts must be set forth with such distinctness, precision and certainty as to enable the court to judge of them, and determine whether they form an excuse or justification sufficient in law.
 9. *Return to rule nisi, what defenses may set up; when bad.*—The return need not be single, but may contain several defenses or justifications consistent with each other, and if one is sufficient, the return must be allowed as to that one; but if the defenses are inconsistent or repugnant to each other, the whole return is bad, because the court can not know which to believe, and taken as a whole, the return is false and will be quashed on

Ex parte Candee.

the demurrer of the petitioner. In such cases, the demurrer is final and not *respondeas ouster*, but a peremptory *mandamus* will be awarded.

“This is an application, made on the relation or petition of Marshall G. Candee, in which he prays for a *rule nisi* to be issued and directed to the Hon. John T. Cook, the judge of probate of Wilcox county, requiring him to be and appear before this court, at such time as may be designated therein, and show cause, if any he have, why a writ of *mandamus* should not issue to him, to compel him to approve of the bond of petitioner as sheriff of Wilcox county, and allow the same to be filed and recorded in his office; and for such other and further remedial writs as may be consistent with law and right in the premises.

“Of said petition it is sufficient to say, it states that petitioner, on and before the 7th day of November, 1871, was over the age of twenty-one years, a resident citizen of Wilcox county and State of Alabama, and qualified to hold office; that on said 7th day of November, 1871, a legal election was held in said county for county officers, and, among others, for the office of sheriff of said county, for the constitutional term of three years; that at said election petitioner and one E. C. McWilliams were the candidates for the office of sheriff; that petitioner received, over and above the votes cast for his said competitor, and over and above the votes cast for any other person than petitioner, for said office of sheriff, a majority of above nineteen hundred votes, and was thereupon, by the supervisors of said election, declared to be duly elected sheriff of said county of Wilcox for the constitutional term of three years; that his election was, by said supervisors, duly certified to the secretary of state, and that on the 21st day of said month of November, 1871, a commission from the governor, Robert B. Lindsay, under the great seal of the State of Alabama, was duly issued to petitioner as sheriff of Wilcox county.

“That said John T. Cook, judge of probate, fixed the amount of the bond to be given by petitioner, as sheriff, &c., as aforesaid, at the sum of forty thousand dollars. Pe-

Ex parte Candee.

petitioner states, that said amount is excessive, and, as he is informed and believes, extraordinarily large, and was a part of a plan and purpose, as he was informed and believed, of said judge and others confederated with him, to deprive petitioner of said office, by requiring a bond so large that he would not be able to give it, with the sureties required by law in case of sheriff's bonds; that this was the first indication of the purpose of said judge, which his subsequent conduct confirmed, to thwart the will of the people of said county in the election of petitioner as their sheriff.

"Petitioner further states, that he is a republican in politics, and in said contest was the republican candidate for said office, and, as he believes, was elected by republican votes, and that said fact produced much prejudice against him in said county, and he apprehended he would not be able to give the required sureties on his bond, all residents of said county, and all known to said judge; and being about to go to obtain sureties upon his bond, he sought an interview with said judge, and inquired what evidence he would require of the solvency and sufficiency of the sureties upon his bond, &c.; that said judge replied, that he should require the oath of the parties (commonly called the oath of justification) of what they were each, respectively, worth, and the certificate of the judge of probate of the county where they resided that he was personally acquainted with them, and believed them worth the amounts for which they respectively justified. With these instructions and this implied assurance, petitioner went to the city of Mobile, and prepared a bond for the amount prescribed, &c., as aforesaid, and payable and conditioned according to law in the case of sheriff's bonds, and procured sureties thereon, to-wit: C. F. Moulton, C. W. Pierce, M. D. Mickersham, Geo. F. Harrington, and Ellen B. Buck, residents of said city and county of Mobile, with their several affidavits that they were worth the amounts severally stated by them over and above liabilities and exemptions, and in the aggregate amounting to \$40,000; and also procured the certificate of the Hon. Gustavus Horton, the judge of probate of Mobile county, that said several sureties to said

Ex parte Candee.

bond were personally known to him, and that they had voluntarily made oath that they were each possessed of property as stated, and that, in his opinion, said affidavits were entitled to full credence, and that to the best of his information and belief, they were severally worth the amounts stated, &c.

“Petitioner further states, that he presented said bond to said John T. Cook, judge, &c., as aforesaid, and, apprehending from his equivocal manner and captious objections to said bond that he intended to reject it, he took said bond and obtained the signature thereto of William Henderson of Wilcox county, and Arthur Bingham of Montgomery county, both of whom are good and solvent men, and owned, as petitioner was informed and believed, property over and above exemptions and their debts, to the amount of \$20,000; that the solvency of said Henderson was personally known to said judge, as he stated; that petitioner procured and presented to said judge the affidavit of said Bingham that he was worth, over and above exemptions and liabilities, the sum of \$5,000.

“Petitioner further states, upon information and belief, that said sureties upon said bond were worth more than the amount of said bond in property in the State of Alabama liable to execution, over and above their debts and legal exemptions.

“Petitioner further states, that within fifteen days after said election, to-wit, on the 22d day of November, 1871, he presented said bond, and the oaths of justification of said sureties, and the certificate of said Horton, judge, &c., as aforesaid, to said John T. Cook, judge, &c., and the affidavit of petitioner that the signatures of said sureties were genuine, except said Henderson's, whose signature was known to said judge, and offered to take the oath of office, &c., and requested said judge to approve of said bond, and that it be filed and recorded in his office. Thereupon, said judge administered to petitioner the oath of office, but refused to approve of said bond, or to allow it to be filed and recorded, &c.

“Petitioner further states, that upon the refusal of said

judge to approve of said bond, and file and record the same, he made another official bond for \$40,000, with other sureties, to-wit, B. W. Norris, C. W. Dustan, J. L. Pennington, Charles O. Whitney, Robert W. Healey, C. W. Buckley, John G. Stokes, and J. W. Dimmick, worth, over and above exemptions and liabilities, in property in this State, the amount of said bond, and on the — day of December, 1871, tendered the same to said judge for his approval, and offered to file the same as his official bond, or to allow the same to be filed or recorded, saying he could not, and would not, receive any bond from petitioner as sheriff of Wilcox county; that petitioner, thereupon, presented to said judge both of said bonds for approval, &c., and said judge again said he would not, and could not, receive any bond from petitioner as sheriff of Wilcox county.

“Petitioner further states that, by reason of said several wrongful and unjustifiable actings and doings of said judge, he is debarred from the exercise of the functions of sheriff of Wilcox county, and deprived of the emoluments of said office.

“Petitioner further states, that on the 20th day of December, 1871, he presented his petition to the Hon. P. O. Harper, judge of the eleventh judicial circuit of this State, which embraces the said county of Wilcox, setting forth the above recited facts, and prayed for a *rule nisi* to said John T. Cook, judge, &c., to appear and show cause why a *mandamus* should not issue to compel him to approve of said bond, or bonds, &c., and for such other proper remedial writs as, in right and law, petitioner should, on consideration, to be entitled to, &c.; that said Harper, judge, &c., as aforesaid, denied the prayer of petitioner, and adjudged him to pay the costs, &c.

“Petitioner states that he has no adequate remedy, &c., except by an application to this court, and prays, &c., as aforesaid.”

WHITE & BOYNTON, for petition.—The duty of the pro-

Ex parte Candee.

bate judge in approving the sheriff's bond is purely ministerial.

An order made by the judge of the county court under the act of 1824, declaring the office of sheriff vacant, &c., is wholly unauthorized, extra-judicial, and entitled to no consideration whatever, as a judgment or inquisition of office.

The statute of 1824 is very similar in its provisions to section 164 of the Revised Code, and if the judge of probate has a right to refuse a good bond when tendered him by a sheriff elect, and thereby prevent the sheriff from filing his bond within fifteen days, if by the failure the law vacates the office, the judge of probate can, by indirection and the mere refusal to perform his duty in approving the bond, accomplish the end of declaring the office vacant, when, if he were to declare it vacant directly, his action "would be of no consideration whatever, extra-judicial," and void.

Is there anything to give consideration to a judgment or judicial action which is indirect, that would not appertain to the same, if direct; and must not the same principle which sets aside the one overturn the other?

If this is a matter in which the judge of probate exercises no judicial discretion, his action in approving the bond is ministerial, and not judicial; and he can exercise only that moral discretion which is involved in determining whether the bond is good and sufficient, and if it is good and sufficient, then he is bound to approve the bond.

There are cases known to the law in which an officer is made the sole judge, and from his decision there is no appeal; but in such cases the sufficiency of the judgment must appear by the record. The record must show affirmatively the facts necessary to sustain the jurisdiction, and even when the facts, when found, are conclusive, still the record must show that they were found by the court. In all such cases, the record is examinable upon *certiorari* from a higher court, and if found defective in the recital of jurisdictional facts, the judgment will be quashed.

The action of a judge of probate in refusing to approve

Ex parte Candee:

a sheriff's bond, is not examinable upon appeal or *certiorari*. There are no entries of his action made of record, and none required. No recitals, no record; nothing of the permanency, the dignity, the conclusiveness, nor the force of a judgment or decree of a court. Its only judicial feature, if that be so considered, is the exercise of discretion in refusing to approve the bond.

In *Wammack v. Holloway*, (2 Ala. 31,) this court decide that the act of February 3d, 1840, which makes it the duty of the circuit judge, in vacation and without the intervention of a jury, to hear and determine whether an election for sheriff has been legally or illegally conducted, and to certify the facts, &c., can not be construed as conferring judicial powers upon the judge of the circuit court.

If such be the construction, the court say they would be compelled to declare the act unconstitutional, "but if the terms used will bear a construction consistent with the constitution, it is our duty to give it such construction."

The same sound rule of construction applied to section 814 of the Revised Code, would require that any doubt in the mind of the court, as to whether the approving of bonds by the judge of probate is a ministerial or judicial act, should be resolved in favor of its being ministerial, because, if held to be judicial, it would be subject to the same constitutional objections pointed out by the court as applicable to the act of February 3d, 1840, and must be declared void.

To give it validity, then, it is necessary to construe this provision as ministerial, and not as judicial.

The judges of the county court, in approving the bond of the sheriff as collector of the revenue, act in a ministerial capacity, having authority only to exercise a *reasonable* discretion in passing upon the sufficiency of the security offered.—*State, ex rel. Jackson, v. Co. Court of Howard Co.*, 41 Mo. 247.

The statute requiring the sheriff to give bond within fifteen days is directory, and does not impose a condition precedent to the party's title to the office.—*Ib.*

The discretion of the county court is confined to an examination of the security offered, and must be a sound, legal discretion, not capricious, arbitrary or oppressive.—*State, ex rel. v. Lafayette Co. Court, ib.* 221.

The discretion, the exercise of which by inferior tribunals or officers, this court will not undertake to regulate or coerce, is that discretion which is not, and can not be governed by any fixed principles or rules.—*The People v. Sup. Court of City of New York*, 5 Wend. 114.

The act of the commissioner of jurors (in New York), in determining upon the sufficiency of the excuse relied on by such an applicant, is not a judicial act within the rule relating to *mandamus*.—*People, ex rel. v. Taylor*, 1 Abb. P. R. U. S. 200.

When a specific duty was imposed by statute upon a public officer, he may be compelled to execute it by *mandamus*, although an action for damages might also lie.—*The People v. The Mayor*, 10 Wendell, 393.

In the case of *The People v. Minor*, (32 Barb. 466,) the writ issued to the register to compel satisfaction of a mortgage, although the register had to decide upon the sufficiency of the satisfaction price.—37 Barb. 466, *et seq.*

In *Sprowl v. Lawrence*, (33 Ala. R.) the court, in construing this section, (125 of the old Code, 164 Rev. Code,) say: "We do not think, however, that the mere failure of a public officer to file his bond within the prescribed time effects his absolute and instantaneous removal from office."

The failure of a legally elected sheriff to file his bond within the time prescribed does not, by its unaided force, operate his instantaneous removal from office, and a bond executed by him more than fifteen days after his election, and before any steps or proceeding on the part of the State to effect his motion, must be considered as the bond of an officer within the meaning of section 132 of the Code. *Sprowl v. Lawrence*, 33 Ala.

If the officer elect has not forfeited his office, he is still an officer, and the office is not vacated.

In *Hill v. The State*, (1 Ala. 559,) the court, in passing upon a similar statute, say, that the action of the judge of

probate under it is not judicial, and that he does not declare or decree the office vacated; and the duty enjoined in section 164 upon the judge of probate is to certify the failure to give bond, and not to declare a vacancy. This, then, is not a proceeding to remove, nor is it a proceeding by the State, but is simply a certificate of a fact by a judge of probate, and could not, consistently with itself or any rule of practice or principle of law, work out a removal from office.

The manner of proceeding referred to by the court is evidently an information in the nature of a "*quo warranto*." The failure to give the bond is, then, the only ground for this proceeding by the State, and until such proceeding is instituted and prosecuted to judgment of amotion, the officer elect continues to be the officer; and if no such inquisition is ever executed, he continues in office to the end of his term.

In the following cases the question of the validity and construction of statutes kindred to that under consideration have been discussed, and the inclination of the courts seem strongly against their validity, in effecting or impairing the right to the office, farther than to furnish grounds for a forfeiture: *McWhorter v. McGehee*, 1 Stew. 552-3; *Hill v. The State*, 1 Ala. 559; *Wammack v. Holloway*, 2 Ala. 34; *Sproul v. Lawrence*, 33 Ala.

When the constitution provides for the election of an officer, he derives his title to the office from the election, and the commission is mere evidence of his election.

In England, where the statutes requiring the test-oath are very stringent, declaring the election null and void if the officer fails to take the oath, the same principle is established by the courts.—2 Mod. 193; 10 Mod. 185; Lord Raym. 299; *State v. Tomer*, 8 Rich. 216; *Kottman v. Ayer*, 3 Strob. 92.

Vacancy in office must be established in a proceeding regularly tending to that end.—*Stokes v. Kirkpatrick*, 1 Metcalf, 138.

An officer is not obliged by *mandamus* to compel a board to approve his said bond, but may defend in *quo warranto*

Ex parte Candee.

on the ground that there is no failure on his part.—*People v. Scammell*, 7 Cal. 432.

The rule, that *mandamus* will not be awarded where the law provides another remedy, is qualified by the condition that the other remedy must be specific and adequate. If there be no other specific and adequate remedy *mandamus* will issue.

There are numerous cases in which the courts have granted the writ notwithstanding there was a remedy by *quo warranto*.—Tapping on *Mandamus*, 27 Mar. top p. 78; *Rex v. Oxford*, 6 A. & E. 349; *Rex v. Colchester*, 2 T. R. 260; *State, ex rel. v. Ely, Judge*, 43 Ala. 568; *King v. Archbishop of Canterbury*, 15 East, 117; *Rex v. Justices of Wiltshire*, 10 East. 404; *King v. Bishop of Chester*, 1 Term, 396; *Etheridge v. Hill*, 7 Por. 54.

PECK, C. J., (after stating facts as above.)—1. The constitution, Art. V, section 21, ordains, that “a sheriff shall be elected in each county, by the qualified electors thereof, who shall hold his office for the term of three years, unless sooner removed,” &c.

Whenever the constitution provides for the election of any civil officer by the people, the right to exercise the office is derived from his election, and the commission issued by the governor is only evidence of the right.

The right to exercise an office is as much a species of property as any other thing capable of possession; in other words, an office is as much property as any thing which is capable of being held or owned.—*Wammack v. Holloway*, 2 Ala. 31. For the safety of the people, however, the legislature may require of an officer, before he enters upon the duties of his office, to give a bond with surety for the faithful performance of his duties. *Salus populi suprema lex*. Although this maxim generally applies to cases of necessity, it also applies to less urgent cases, as, where the legislature, for the public good, regulates and restricts the use and enjoyment of property by individuals.—Broom’s Legal Maxims, m. p. 4. This is especially so, as it respects the right to exercise the privileges and enjoy the profits and

Ex parte Candee.

emoluments of a public office. For this purpose section 814 of the Revised Code enacts, that a "sheriff, before entering on the duties of his office, must give bond, with security, in an amount to be fixed by the judge of probate of his county, not less than five thousand dollars, payable and conditioned as provided in section 157, which bond must be approved by the judge of probate, and filed in his office."

Section 162 of the Revised Code provides, that "such bonds, when required to be filed in the office of the judge of probate, must be filed therein within fifteen days after such election or appointment." And section 164 says, that "if any officer of this State, required by law to give bond, fails to file the same in the proper office, within the time fixed by the four preceding sections, *he vacates his office,*" &c.

An office being property, is, like other property, under the protection of the law, and consequently no one can be deprived of his office "but by due process of law."—Art. I, § 8, Const. "Due process of law" means a judicial proceeding regularly conducted *in a court of justice*, as contradistinguished from a statutory enactment.—*Dorman v. The State*, 34 Ala. p. 236; *Weaver et al. v. Lapsley*, 43 Ala. pp. 224–232.

The office of sheriff being a constitutional office, as distinguished from an office created by statute, a sheriff, no more than the highest officer in the State, can be deprived of his office, nor can it be vacated by an act of the legislature. This can only be done "by due process of law."

If the only construction of said section 164 is, that by its own vigor it vacated the petitioner's office, because his official bond was not filed in the office of the judge of probate within fifteen days after his election, then we should be constrained to declare it unconstitutional. Such a construction would be to deprive petitioner of his office, without providing any mode by which his right to his office could be determined by the verdict of a jury, and thus bring it in conflict with section 13, article I, of the consti-

Ex parte Candee.

tution, which declares, "that the right of trial by jury shall remain inviolate."

It seems to us more reasonable to construe said section to mean, that the failure of petitioner to file his bond in the office of the judge of probate within fifteen days after his election, did not, *per se*, vacate his office, but created a cause of forfeiture or vacancy only, that might be enforced by the State in a proper judicial proceeding instituted for that purpose. In such a proceeding, it would be a good defense to show, that the failure to file his bond within the time prescribed was not the fault of petitioner; that he had tendered to the judge of probate a good and sufficient official bond, within the fifteen days, and requested said judge to approve of, and file and record the same, and that he neglected or refused to approve of, and to file and record said bond, without any sufficient legal reason therefor. We think such a construction warranted by the decisions of this court, in the cases of *Wammack v. Holloway*, *supra*; *Sprowl v. Lawrence*, 33 Ala. 674; and *The State, ex rel. v. Ely, Judge, &c.*, 43 Ala. 568.

2. Having determined that the petitioner, on the facts stated in his petition, (and for the purposes of this application, being *ex parte*, they are to be taken as true,) is sheriff of Wilcox county, and that he is prevented from entering on the duties of his office, by the wrongful refusal of the judge of probate of said county to approve of his official bond, and to permit it to be filed and recorded in his office, as required by said sections 164 and 814 of the Revised Code; we now proceed to the examination of the question, whether the petitioner is entitled to the aid of the writ of *mandamus* to compel said judge of probate to approve of his official bond, and to file and record the same in his office.

We think it can admit of no doubt, that where there is a right to execute an office, perform a service, or exercise a franchise, more especially if it be a matter of public concern, or attended with profit, and a person having such right is wrongfully kept out of possession of such right, or prevented from entering upon the discharge of its duties,

and he has no other specific legal remedy, the courts will interfere by *mandamus*, upon reasons of justice and public policy, to preserve peace and good government.—Moses on *Mandamus*, 14; 3 Stephen's *Nisi Prius*, 2292.

Where the duty to be performed is, accurately speaking, judicial, or rests in the discretion of the court, judge or officer, a *mandamus* will lie to compel the court, judge or officer to go forward and do the duty, or to exercise the discretion, but it will not direct how the duty shall be performed or the discretion shall be exercised; if, however, the duty is ministerial, and not wholly discretionary, in the court, judge or officer, and the duty itself is specific and defined, and it is neglected or refused to be performed, a writ of *mandamus* will be issued, not only to compel its performance, but it will direct particularly how the duty shall be performed.

The duty of a probate judge to approve of a sheriff's official bond is, in no proper sense, a judicial duty. It by no means follows that a duty is judicial, because it is to be performed by a judge; if in its performance he does not exercise the powers that appropriately appertain to his judicial office, it is ministerial, and not judicial, although its performance requires the exercise of his judgment.

A judge of the circuit court may issue an attachment, and in doing so, he is required to take a bond, with sufficient sureties; in other words, he must approve of the bond and judge of the sufficiency of the sureties. In doing this, he does not perform a judicial duty, for the same thing may be done by the clerk of his court. Other instances will readily suggest themselves, without being here stated, where acts and duties are not only performed, but are required to be performed by judicial officers, that are in no proper sense judicial acts or duties.

As a striking instance of this sort, I refer to the case of *Wammack v. Holloway*, *supra*. But I deem it unnecessary to argue this matter further; the question has been decided by this court, and it is no longer an open question with us. In the case of *The State, ex rel. v. Ely, Judge, &c.*, it is decided that *mandamus* is the appropriate remedy to compel

Ex parte Candee.

the probate judge to approve of a tax collector's official bond.—43 Ala. 568. In principle, there is no real distinction between that case and the present.

We also hold, that the duty of the probate judge to fix the amount of a sheriff's official bond is a ministerial duty, and that he may not only be compelled to fix the amount, but also that this court has the power to superintend and control the performance of this duty, and require it to be done in a reasonable manner. We do not now decide that the amount of petitioner's bond in this case is excessive; it is not necessary to do so, but we feel constrained to say, we think it unreasonable and oppressive, and that the judge of probate owes it to himself as a conscientious man, to his reputation as a just and an impartial judge, to reduce the amount of said bond, lest it may be drawn in, as a precedent in future cases, to the great scandal of the law and its administration, and to the detriment and hindrance of the public service and the general welfare.

Let a *rule nisi* be issued to the Hon. John T. Cook, the judge of probate of Wilcox county, requiring him to approve of the official bond of Marshall G. Candee, sheriff of said county, presented to him for approval on the 22d day of November, 1871, and that he file and record the same in his office, or that he show cause on Thursday, the motion day of the first division of this court, at the next term thereof, to commence on the first Monday of June of this present year, why he has not done so.

After the delivery of the foregoing opinion, and the service of the *rule nisi*, as therein ordered, at the January term, 1872, the Hon. John T. Cook, probate judge, &c., appeared at the June term, 1872, and moved to dismiss the petition, on the ground that petitioner's remedy was not by *mandamus*. This motion and the return to the *rule nisi* were submitted together.

The return to the *rule nisi* sets out, in substance, the fol-

Ex parte Candee.

lowing grounds why a peremptory *mandamus* should not issue:

1. Respondent admits that petitioner was duly elected sheriff of said Wilcox county on the 7th day of November, 1871; that said election was duly certified to the governor of the State of Alabama, but respondent does not know whether or not a commission was issued by the governor to said Candee as such sheriff. He admits that said Candee, on the 22d day of November, 1871, tendered to him, as such judge of probate, a bond as such sheriff, with security thereon, which securities were insufficient, in the penalty of forty thousand dollars and payable and conditioned according to law, and that respondent refused to approve, record and file said bond.

2. That respondent refused to approve, record and file said bond presented to him, &c., by petitioner, on the 22d of November, 1871, being the same bond specified in said alternative writ, because respondent was, and is still, satisfied that at the time said bond was presented, that the securities were insufficient.

3. That respondent refused to approve, record and file the said bond presented to him, &c., by the petitioner, on the 22d day of November, 1871, being the same bond specified in the said alternative writ, because the securities on said bond did not separately, or in the aggregate, at the time they signed said bond, or the time said bond was presented to him for approval, own property within the limits of the State of Alabama, in their own right and subject to legal process, to the amount of the penalty of said bond, excluding exemptions; that respondent would at once, and without hesitation, have approved said bond, if it had been sufficient; that respondent never has refused to approve, record and file a sufficient bond tendered by the said Candee, as sheriff as aforesaid.

4. That respondent refused to approve, record and file the said bond presented to him, &c., by petitioner, being the same bond specified in the alternative writ, because respondent was satisfied at the time said bond was presented, and is still satisfied, that the securities to the said bond in

Ex parte Candee.

the aggregate were insufficient, and that the said securities in the aggregate did not, either at the time they signed said bond, or at the time said bond was presented to him for approval, own property within the limits of the State of Alabama, in their own right and subject to legal process, to the amount of the penalty of said bond, excluding exemptions.

5. That respondent refused to approve, record and file the bond presented to him, &c., by the petitioner, on the 22d of November, 1871, being the same bond specified in said alternative writ, because respondent was satisfied at the time said bond was presented, and is still satisfied, that the securities to the said bond were insufficient, and that the said securities did not, either at the time they signed said bond, or at the time said bond was presented to him for approval, (to-wit, on the 22d of November, 1871,) own property within the limits of the State of Alabama, in their own right and subject to legal process, &c., to the amount of the penalty of said bond, excluding exemptions; and that the said Candee himself did not, either at the time he signed said bond, or at the time said bond was presented to respondent for approval, (to-wit, on the 22d November, 1871,) own property within the limits of said State, subject to legal process, excluding exemptions.

6. That respondent refused to approve, record and file the said bond presented to him, &c., by the petitioner, being the same bond specified in said alternative writ, because at the time the securities on said bond signed the same, and at the time said bond was presented to him for approval, the said securities on said bond were not worth anything over and above their debts and liabilities; that at the time aforesaid the said securities were (as securities and principals) on official bonds, and other legal bonds, given and executed within the limits of the State of Alabama, then outstanding, &c., to the amount of over one hundred thousand dollars, and respondent says that said securities on said bond were insufficient at the time they signed said bond, and at the time said bond was presented to him for approval.

Ex parte Candee.

7. That respondent refused to approve, record and file the said bond presented to him, &c., by the petitioner, on the 22d November, 1871, because respondent, at the time said bond was presented, was satisfied, and is still satisfied, that the securities on said bond were insufficient; that the said M. D. Wickersham, one of the securities on said bond, was, at the time he signed said bond, and at the time said bond was presented, &c., on official bonds and other legal bonds, given and executed within the limits of the State of Alabama, then outstanding, &c., to the amount of over twenty-five thousand dollars; that the said George F. Harrington, another of the securities, was, at the time he signed said bond and at the time said bond was presented to respondent for approval, on official bonds and other legal bonds, given and executed within the limits of the State of Alabama, then outstanding, &c., to the amount of over twenty thousand dollars; that C. W. Pierce, another of the securities, was, at the time he signed said bond and at the time it was presented to respondent for approval, on official bonds and other legal bonds, given and executed within the limits of the State of Alabama, then outstanding, &c., to the amount of over five thousand dollars; that C. F. Moulton, another of the securities, was, at the time he signed said bond and at the time it was presented to respondent for approval, on official bonds and other legal bonds, given and executed within the limits of the state of Alabama, then outstanding, unsatisfied, &c., to the amount of over twenty thousand dollars; that A. E. Buck, another of the securities, was, at the time he signed said bond and at the time said bond was presented, &c., on official bonds and other legal bonds, given and executed within the limits of the State of Alabama, then outstanding, &c., to the amount of over twenty thousand dollars; that William Henderson, another of the securities, was, at the time he signed said bond and at the time said bond was presented to respondent, &c., for approval, on official bonds and other legal bonds, &c., to the amount of over sixty thousand dollars; that Arthur Bingham, another security, was, at the time he signed said bond and at the time it was presented,

Ex parte Candee.

&c., on official bonds and other legal bonds, given and executed within the State of Alabama, then outstanding, &c., to the amount of over ten thousand dollars; that the said Ellen B. Buck, another of the securities on said bond, at the time she signed said bond was a married woman, the wife of one A. E. Buck.

8. That a very short time after the election for sheriff, petitioner came to respondent and asked what amount the bond of the sheriff of said Wilcox county would be fixed at, to which respondent replied, "at forty thousand dollars." Petitioner then and there replied, that that was a reasonable amount, and that he was satisfied. Respondent further says, that the records of Wilcox county in his office show that the bonds of the sheriffs of said Wilcox county, for the last thirty years, and up to the present time, excepting a short period since the war, have never been less than forty thousand dollars, and that for much the greater part of that time, the sheriff's bond has been in the penalty of \$50,000; that the bond of E. C. McWilliams, who now holds the office of sheriff of said Wilcox county, and discharges the duties of said office of sheriff of Wilcox county, is for forty thousand dollars; and that at the last spring term (1872) of the circuit court held for said county of Wilcox, the grand jury of said county, in their official report, recommended that the bond of the said E. C. McWilliams, as sheriff of said county, be raised to the penal sum of fifty thousand dollars.

9. That the petitioner did, on or about the 20th day of December, 1871, and before the commencement of proceedings in this court, present his written petition to the judge of the eleventh judicial circuit, which embraces the said county of Wilcox, setting forth the same facts as those set forth in the said alternative writ, and praying the said circuit judge to grant petitioner a *rule nisi* to this respondent, as judge of probate of Wilcox county, commanding respondent to appear before the said circuit judge and show cause why a *mandamus* should not issue to compel respondent to approve said bond or bonds of petitioner, as sheriff of Wilcox county, and to permit petitioner to have the same

Ex parte Candee.

filed and recorded; and for such other proper and remedial writs as, in right and law, the petitioner should appear on consideration to be entitled to; and the said petition was overruled and refused, and said petition denied, and the costs adjudged against the petitioner, from which decision the said petitioner has not appealed, nor in any way sought to revise the same, but the said decision is now in full force and effect.

10. That on the 21st day of December, 1871, the petitioner presented to the judge of the eleventh judicial circuit of the State of Alabama, to which circuit the county of Wilcox belongs, his petition to have the said judge fix the amount of his (said Candee's) bond as sheriff of said Wilcox county; that on said application, the judge as aforesaid fixed the amount of said bond, and took and approved the same; that on the 13th day of January, 1872, on the petition of said Candee, the circuit judge issued an alternative writ of *mandamus*, directed to this respondent, commanding him to record and file the bond of the said petitioner, as sheriff of Wilcox county, which had been fixed and approved by the circuit judge of the eleventh judicial circuit as aforesaid; that such proceedings were had on said petition, that on the hearing before the circuit judge, on the 25th day of January, 1872, the prayer of the petitioner for a peremptory *mandamus* was granted; that an appeal to this court from the said decision was taken by this respondent, and said appeal is now pending in this honorable court.

11. That under the laws of the State of Alabama, as they stood on the 22d day of November, 1871, when said bond was presented to respondent for approval, respondent was not the officer appointed by law to fix and approve the said bond of the said Marshall G. Candee, as sheriff of said county of Wilcox.

The petitioner moved to quash the return to the *rule nisi*—

1st. Because it is no answer to the *rule nisi*.

2d. Because the return is insufficient and uncertain.

Ex parte Candee.

3d. Because it does not answer all the statements of the petition.

4th. Because it is argumentative, evasive and repugnant.

ALEX. WHITE, *pro motion*.—As we have no statute similar to that of Ann. 9 Ch. 20, allowing a traverse of the answer to a *rule nisi* in *mandamus*, the English practice, as it was before the passage of that statute, not in its *most* stringent sense, but still in a stringent sense, prevails in Alabama. The answer is pleading, and the reason of the rule of strictness is, that as the party seeking the right is required to accept the answer as true, and is defeated or can proceed no further, if the answer present a good defense, it devolves upon the defendant to meet the entire case made by the petitioner, answer *all* the allegations of the petition, and answer them directly, explicitly and fully. The right which he has to compel the petitioner to take his answer as true, invokes the correlative right in the petitioner to have a full and direct answer. This is upon the conception of that level or platform of even justice which the law contemplates as assigned to any one and to all parties in our courts, and from which there can be in the abstract no departure, no matter how difficult it may be in all cases to carry it into practice.

Closely linked to this is the next and most commonly assigned reason for this rule, that is, that the defense made by the answer must be stated with such degree of certainty, as to enable the court to determine whether it constitutes a justification or an excuse for failing to obey the mandate of the court, as expressed in the *rule nisi*.

This certainty is not a capricious rule. It is fixed and defined with as much accuracy as a pure abstraction can be. It is defined by legal phraseology: "Certainty to a certain extent in general." It is made more perspicuous, by degrees above and below, in pleading.

1st. Certainty to a common intent. 2d. Certainty to a certain extent in general. 3d. To a certain intent in every particular.—Co. Lit. 303a; 1 Chitty's Pl. 233.

The first of these is sufficient in a plea in bar.—Chitty,

supra. But the second is the certainty which is required in a return to *mandamus*.

Now, without again reviewing the several matters set up in the return, or enumerating the particulars in which they are deficient, it is respectfully submitted, that when subjected to legal tests, they are signally defective. Pleading is something more than a mere general statement of facts.

It is the facts which constitute the issue or issues between the parties to a cause, stated according to established rules, which have been adopted as the best mode of eliminating truth and administering justice, and if a declaration or plea fails to conform to these established rules, it is not sufficient.

The return in this case states, in a general and very loose manner, some facts from which it might be inferred that the defendant was justifiable in not approving the bond of petitioner; but it presents no issuable matter from which, if true as stated, the court can know that he was justifiable. As an example, the court can not pass upon the validity of bonds of which no description is given. Suppose it to be the case of a higher security given, and that when sued on an open account, the defendant should plead that he had given a promissory note for the account, without any description of the note; its date, amount, to whom given, and when due. Such a plea would be manifestly demurrable. Why? Because the court could not know, upon the face of the plea, whether it was good or not.

This is the rule of certainty applicable to pleas in bar, but a stricter rule applies to returns to a *mandamus*—"Certainty to a certain extent in general."

This means what, upon a fair and reasonable estimation, may be called certain, without recurring to possible facts which do not appear. The charge must contain such a description of the crime, &c., that, without intending any thing but what appears, the defendant may know what he is to answer, and what is intended to be proved, in order that the jury may be warranted in their verdict and the court in the judgment they award.—1 Chitty's Plead. 233a, (marg. 234.)

Ex parte Candee.

The return is clearly inconsistent. If this be a just ground of objection, the authorities declare, "that the return must be quashed, and that a peremptory *mandamus* must be awarded."

The excuse which the defendant sets up in the body of his return for refusing to approve the bond of petitioner is, that the security was insufficient. This is repeated often, in manner and form somewhat different.

In conclusion, he sets up, that he did not approve the bond because he was not the officer authorized by law to approve it.

Now, one or the other of these must be false. If he was not authorized by law to approve the bond, he could have had nothing to do with the question of the sufficiency of the sureties, no more than a stranger or any other citizen of Wilcox county.

On the other hand, he says that the said Candee came to him, after his election, and asked him at what he would fix his bond, and he told him at forty thousand dollars; and Candee replied, that that was very reasonable, and that he was satisfied with it.

This, and many other paragraphs, imply irresistibly that he was the officer authorized by law to approve the bond, and are utterly inconsistent with the assertion in the 11th paragraph, that he was not such officer.

S. J. CUMMING, *contra*.—1. The petitioner's remedy is not by *mandamus* from this court. It is by *certiorari*, or appeal, to bring up and review the decision of the circuit judge, refusing to grant the prayer of the petition to him for a *rule nisi*.—Const. Ala. § 2, art. 6; *The State, &c., v. The Judge of Macon Co.*, 15 Ala. 740; *Tarver v. Comm'rs Court*, 17 Ala. 526; *Comm'rs Ct. v. Tarver*, 21 Ala. 661; *Ex parte Keenan*, 21 Ala. 558; Acts of 1868, p. 410; *Ex parte Croom & May*, 19 Ala. 561; *State, &c., v. Taylor*, 19 Wis. 566.

The case of *Ex parte Boynton*, (44 Ala. 261,) does not overrule or militate against *Ex parte Henderson*, as neither the reasons given, or the facts stated, exist in this case.

The point now made was not raised or discussed in *Ex parte Selma & Gulf R. R. Co.*, (45 Ala. 696.) Another reason why *Ex parte Boynton* does not apply is this: The act of 1868 does not give an appeal from the decision of a probate judge, but only from judgments of judges of the circuit and city courts.

The rule is a familiar one, that a *mandamus* will not issue where there is any other adequate and sufficient remedy. Here there was, and is, an adequate and sufficient remedy under the act of 1868, p. 410.

Previous to the act of 1868, there was no law giving an appeal in such cases, and the decisions of this court previous to the passage of that act, are to be considered with that point in view.—*State v. The Judge, &c.*, 12 Ala. 342.

2. The return is sufficiently certain. The old strict rule as to certainty in return does not hold, either in England or in this country, at the present time. It has been greatly relaxed. The rule laid down is, that the return must be good, tested by the ordinary rules of pleading both in form and substance.—*Moses on Mand.* 210; *Comm'rs Court v. Tarver*, 29 Ala. 414; *Chance v. Temple*, 1 Clarke, (Iowa,) 178; *Inhabitant, &c., v. Co. Comm'rs*, 10 Pick. 59.

In this State the rules of pleading are liberal, and are no more strict in *mandamus* cases than in other cases.—*Ex parte Garland*, 42 Ala. 559.

3. Although the duty of a judge of probate, in the matter of the approval of a sheriff's bond, may be in its nature ministerial, yet he has a discretionary power vested in him by the statute, and that discretionary power of the probate judge will not be controlled by *mandamus*.—*Moses on Mandamus*, p. 61; *Gulick v. New*, 14 Ind. 93; *Ex parte David Taylor*, 14 How. (U. S.) 3; *Bradshear v. Mason*, 6 ib. 92; *Com. v. Justices, &c.*, 2 Pick. 414; *Glasscock v. Com'rs, &c.*, 3 Texas, 51; *Meyer v. Carolan*, 9 Texas, 250; *Kendall v. U. S., &c.*, 12 Peters, 524; *Decatur v. Paulding*, 14 Pet. 515; *Dunklin Co. v. Dist. Court*, 23 Mis. 449; *Cullem, Adm'x, v. Latimer*, 4 Texas, 329; *People v. Board of Sup.*, 12 Barb. 446; *People v. Canal Board*, 13 Barb. 432; *Com'rs v. Smith*,

5 Texas, 471; *Brem v. Ark. Co. Ct.*, 4 Eng. 240; *U. S., &c., v. Judge Lawrence*, 3 Dallas, 53; *Green v. Purnell*, 12 Ned. 329; *State, &c., v. Fletcher*, 39 Mis. 388; *School Directors v. Anderson*, 45 Penn. 388; *State, &c., v. Robinson*, 1 Kan. 188; *Ex parte Echols*, 39 Ala. 698; *Williams v. Saunders*, 5 Caldwell, 60; *Arberry v. Beavers*, 6 Texas, 456; *Sinnickson v. Corwine*, 2 Dutcher, 311.

4. The judge of probate having exercised the discretion vested in him by law, as shown by his return, if he has improperly and falsely exercised that discretion, the petitioner's remedy is by an action against him. The return must be taken as true.—*Tarver v. Comm'rs*, 21 Ala. 661; *Meyer v. Carolan*, 9 Tex. 250; *Harwood v. Marshall*, 10 Md. 451; *Carroll v. Board of Police*, 28 Miss. 38; Rev. Code, §§ 157, 814.

5. What is ministerial, and what judicial? Where the law prescribes and defines the duty to be performed, with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial. But where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial. *Comm'rs v. Smith*, 5 Texas, 470; *State, &c., v. Hastings*, 10 Wis. 518.

6. The return must be made to the writ, and not to the petition. The writ answers the place of a declaration.—See Tapp. on Mand., ch. 5, p. 308. And such is the modern practice, as laid down by Moses in his work on *Mandamus*.—See p. 203.

7. The appeal act of 1868 can not be held as cumulative to the right of this court to issue a writ of *mandamus* in this case; because *mandamus* is never granted where there is any other adequate remedy. The act of 1868, p. 410, gives an adequate remedy to the petitioner.

8. If it should be held by this court that the return should have been to the petition, and not to the writ, or *rule nisi*, then the respondent asks leave to file an answer more full and perfect. The record will show that neither the petition, nor a copy of it, was served upon the respondent.—*State, &c., v. Jones*, 10 Iowa, 65.

9. As to the practice in *mandamus* in this State, see *Ex parte Garland*, 42 Ala. 559; *Chance v. Temple*, 1 Clarke (Iowa) 178.

PECK, C. J.—Before entering upon the examination of the return of the Hon. John T. Cook, probate judge of Wilcox county, to the *rule nisi* in this case, ordered to be issued by this court at the January term thereof, 1872, it seems proper to consider and dispose of the motion, now made by said probate judge, to dismiss the petition in this behalf, upon which the said *rule nisi* was granted. Said petition states, that before petitioner made his application to this court for said *rule nisi*, he had, on his petition setting forth the same facts stated in his petition in this behalf, made an application to the circuit judge of the proper circuit, for a *rule nisi* on said probate judge, to show cause why he refused to approve of and file his (petitioner's) official bond as sheriff of said county of Wilcox; and that said circuit court judge denied the prayer of petitioner's said petition, and taxed him with the costs.

The said probate judge now insists that petitioner's remedy in the premises was not by *mandamus* from this court, but on the denial of his said application by said circuit court judge, his remedy was by *certiorari* and appeal, to bring up and review the decision of said circuit court judge, and, therefore, he now here moves this court to dismiss said petition.

Although an appeal might have been taken to this court from the decision of the circuit court judge, was that the petitioner's only remedy? Or might he not renew his application in this court, setting forth such a state of case as showed that the circuit court judge who made the decision erred to his prejudice, and that petitioner was entitled, by the case made before the said circuit court judge, to the relief he sought?

This was the course pursued in *Ex parte Croom & May*, (19 Ala. 562.) And this course, we hold, may now be pursued, notwithstanding the act of the 15th of December, 1868, (Pamph. Acts 1868, p. 410,) entitled "An act to allow

Ex parte Candee.

appeals to the supreme court, in certain cases." That act provides, "that appeals *may be taken* to the supreme court of Alabama, from the judgments of judges of the circuit and city courts, on application for writs of *certiorari*, *supersedeas*, *quo warranto*, *mandamus*, and other remedial writs," &c.

We think it manifest, this act does not, and was not intended to, limit and control the powers of this court, and to direct the mode and manner in which it must exercise the powers conferred upon it by section 2, article 6, of the constitution, to give it a general superintendence and control of inferior jurisdictions. Said section declares, that "except in cases otherwise directed in this constitution, the supreme court shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions and regulations, not repugnant to this constitution, as may from time to time be prescribed by law; *Provided*, that said court shall have power to issue writs of injunction, *mandamus*, *habeas corpus*, *quo warranto*, and such other remedial and original writs, as may be necessary to give it 'a general superintendence and control of inferior jurisdictions.'"

Under this section of the constitution, the legislature may impose such restrictions and regulations, not repugnant to the constitution, upon the appellate jurisdiction of this court, but it has no power to limit or prescribe the mode and manner in which it must exercise its power to issue the writs therein named, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions. If they could, the power thus conferred upon this court by the constitution might be so crippled and embarrassed, as to render it worthless for the great and salutary purposes contemplated by the constitution.

This court has the power to adopt its own practice and mode of proceeding, in exercising the powers conferred upon it by the proviso of this section of the constitution, and to so mould and fashion it, as to fit it to the exigencies of each particular case.

In the case of *Ex parte Croom & May, supra*, which was an application on the part of the petitioners for the writ of *habeas corpus* to admit them to bail, after an application to a circuit judge for that purpose had been denied, this court says, "it is the duty of this court, in order to enable it to carry out the powers with which the constitution invests it, of exercising 'a general superintendence and control of inferior jurisdictions,' to adopt such course of proceeding as will make its control complete."

This court also says, in the same case, "it is important that the practice in such cases should be settled, and after the best deliberation which we have been enabled to bestow upon this branch of the case, we conceive the correct practice to be, for the prisoners, who conceive themselves aggrieved by the decision of the inferior jurisdiction in the matter of their discharge, to petition this court for the writ of *habeas corpus*, and such other remedial process as shall be necessary to render its control effectual, setting forth, under oath, such a state of case as shows that the court or judge who made the decision, erred to their prejudice; and that they are entitled, by the case made before such inferior tribunal, to the relief which they seek." Here is a general idea as to the practice to be pursued, when applications are made to this court for the benefits of the writs which it is authorized to issue, by virtue of the powers conferred upon it by said section of the constitution. But, as the mode of proceeding, in its details under one writ, would not be a suitable or convenient practice, in proceedings under other of said writs, bearing in mind the general idea, the court must, necessarily, be left to adopt such practice as will best suit the exigencies of each particular case, considered with reference to the nature and character of the writ necessary to be used. The practice that would be suitable in a case of *habeas corpus*, would not be suitable in a case of *mandamus*, and this may be said with respect to the several writs authorized to be issued by this court under said section of the constitution.

This, we hold, is not only consistent with the general idea of the practice that may be pursued in such cases, as

Ex parte Candee.

indicated in the said case, *Ex parte Croom & May*, above referred to, but also with the case of *Ex parte Simonton et al.*, in 9 Porter, 383. In such cases, the party aggrieved by the action of an inferior court or judge may elect to proceed by appeal, under the said act of the 15th of December, 1868, or by the practice indicated by this court before the passage of said act. That act provides a cumulative remedy, but does not, and can not, prescribe the only practice to be pursued in this court. For these reasons, the said motion to dismiss the petition must be overruled.

2. I now proceed to the consideration of the return of the defendant, the said John T. Cook, the probate judge of Wilcox county, to the rule to show cause why a *mandamus* should not issue to compel him to approve of and file in his office, petitioner's official bond, as sheriff of said county of Wilcox. In such cases, the petition of the party at whose instance the rule to show cause is obtained, is treated as the complaint, in which the petitioner sets forth his title and the facts on which he claims a right to the relief sought by his application, and the defendant's return is treated as a plea, in which he must either deny the facts stated in the petition, on which the petitioner's claim to relief is founded, or it must state other facts sufficient in law to defeat the petitioner's application. And these facts must be stated positively, and distinctly, and with such certainty, that the court may be able to judge of them, and determine whether they form an excuse or justification sufficient in law, or not. This strictness is required, because the petitioner can not traverse the return. It must be taken to be true, and if false, the petitioner's remedy is an action for a false return.—Tapping, 353; Moses, 210. Every allegation of the return, therefore, must be direct, and be stated in the most unqualified manner, not inferentially or argumentatively, but with certainty and plainness.—*Commonwealth, ex rel. Thomas, v. The Comm'rs of Alleghany Co.*, 32 Penn. 218; Tapping, 354, 357.

The same certainty is required as that which governs estoppels, indictments, or returns to writs of *habeas corpus*, 32 Penn., *supra*; Tapping, 353. Every intendment is made

against a return to a *mandamus*.—Moses, 213; *The People v. Kilduff*, 15 Ill. Rep. 492; Tapping, 353.

A return to a *mandamus* need not be single, but may contain several defenses or justifications, consistent with each other; and if one be sufficient, the return must be allowed as to that one.—*Wright v. Fawcett*, 4 Burr. 2041; Moses, 214. Where, however, inconsistent causes for not obeying a *mandamus* are stated in the return, it must be quashed; for, taken as a whole, it is false.—Angell & Ames on Cor. 457. So, when two or more causes, returned to a *mandamus*, are inconsistent, the whole must be quashed, because the court can not know which to believe, and it is an objection to the whole return.—*The King v. The Mayor of Cambridge*, 2 T. R. 456, 458.

Guided and governed by these authorities, we feel constrained to declare the defendant's return in this behalf both uncertain and insufficient, and that the causes assigned for refusing to approve of petitioner's official bond, as sheriff of said county of Wilcox, are not only inconsistent, but also repugnant to each other, and can not stand together.

In the defendant's return, eleven different defenses are set up, eleven different causes assigned, to excuse or justify his refusal to approve of and file petitioner's official bond. I do not deem it necessary to discuss and dispose of each one separately. It will be enough to show their uncertainty and insufficiency, and to point out wherein they are inconsistent and repugnant to each other.

The first two causes assigned by the defendant do not, either of them, deny the statements of the petition, or set up any fact or facts amounting to any legal excuse or justification for defendant's refusal to approve of and file said bond.

In the first, petitioner's title is admitted. It is admitted he was duly elected sheriff of said county of Wilcox, on the 7th day of November, 1871, and that said election was duly certified to the governor, and that on the 22d day of said month a *bond* was tendered with security, in the penalty of forty thousand dollars, payable and conditioned

Ex parte Candee.

according to law, which securities defendant says were insufficient. This is neither an admission nor a denial that *the bond* made a part of the petition was not presented for defendant's approval, or that it was not in all respects such a bond as the law required petitioner to present for approval. This cause is, therefore, both uncertain and insufficient.

The second cause merely states that defendant refused to approve of the bond presented, because he (defendant) was, and still is, satisfied that the securities were insufficient. This is no averment that the securities were in fact insufficient, and is, therefore, worthless as a defense.

The third cause states his refusal was, because the securities on said bond, without showing who they were, did not, separately or in the aggregate, own property in their own right, and subject to legal process, to the amount of the penalty of said bond, excluding exemptions, without averring that said bond was the bond named in the petition, or that the said bond was in fact insufficient. This cause consists of mere generalities, without any of that directness and certainty required in such returns, as to enable this court to determine whether they form an excuse or justification effectual in law; besides, said cause is inconsistent with the matters stated in the eleventh part of said return.

The fourth, fifth, sixth and seventh causes, or defenses, may be grouped and considered together. They are somewhat varied in the manner of their statements, but neither of them presenting, with certainty and explicitly, any issuable facts; are evasive, containing no positive and plain statement of facts, showing any legal excuse or justification which the court can determine to be sufficient; resting mainly upon the ground that defendant was satisfied that the securities were insufficient; that they were not worth any thing over and above their debts and liabilities; that they were, as securities and principals, on official bonds and other legal bonds, given and executed within the limits of the State of Alabama, then outstanding, unsatisfied, undischarged, and in full force and effect, to the amount of

Ex parte Candee.

over one hundred thousand dollars, and that said securities were insufficient, &c. The said alleged bonds are neither set out nor described; not even the names of the persons for whom they are alleged to be bound, either as principal or sureties, are stated; nor when they were made, nor for what sums, nor to whom payable, is not stated. Which of said alleged bonds are individual bonds, and which official, is not known, nor for what officer or officers said bonds were given, is not disclosed. These vague matters, set up to excuse and justify the defendant, amount to mere bald statements, that said securities are on *somebody's bonds*, as principals or securities, and nothing more. If sued for a false return, how could its falsity be established, with the data here given? Or how could defendant be indicted for perjury, on such uncertain, indefinite, and undefinable statements? How could they be proved to be false? No argument is necessary to show that these several causes are utterly deficient in the plainness, directness and certainty of statement required in returns of this sort. Mr. Chitty says, a general statement of facts which admits of almost any proof to sustain it, is objectionable.—1 Ch. Pl. 232. Such is eminently the character of the statements in defendant's return. Even in ordinary pleading, the facts must be stated with such certainty, as that they may be understood by the party who is to answer them, by the jury who is to ascertain their truth, and by the court who is to give judgment.—1 Ch. Pl. 233.

The eighth cause assigned does not even pretend to set up any excuse or justification for refusing to approve of petitioner's bond, &c., but contains a mere statement, that when petitioner inquired of defendant in what amount his bond would be fixed, he told him it would be for \$40,000; that petitioner said he was satisfied with it.

The ninth sets up the application of petitioner to Judge Harper, the circuit court judge, for a rule to said defendant, to show cause why a *mandamus* should not issue, &c., which application was refused, &c., and that no appeal was taken by petitioner. In considering the defendant's motion to dismiss the petition in this case, we have shown that said

Ex parte Candee.

proceeding presented no legal obstacle to the renewal of petitioner's application to this court.

The tenth cause states, that on petitioner's application to said Harper, circuit court judge, &c., after his refusal to grant the rule to show cause, &c., said Harper had fixed the amount of petitioner's bond as sheriff, &c., and had approved of the same, and on the 25th day of January, 1872, had issued a peremptory *mandamus* to defendant, commanding him to record and file said bond, and that defendant had appealed from said decision to this court, and that said appeal was pending in this court.

It is perfectly apparent that these proceedings were not the cause why defendant refused to approve of and file petitioner's bond, tendered to him for that purpose on the 22d day of November, 1871, more than two months before the alleged order for said peremptory *mandamus* is charged to have been made, and, therefore, is no legal answer to the rule to show cause, issued by this court. It is foreign and irrelevant to the proceeding.

The eleventh cause assigned in said return is as follows, to-wit: "Respondent, for further return to said alternative writ, says, that under the laws of the State of Alabama, as they stood on the 22d day of November, 1871, when said bond was presented to respondent for approval, this respondent was not the officer appointed by law *to fix and approve of* said bond of said Marshall G. Candee, as sheriff of said county of Wilcox."

We can but regard this as a mere false pretense on the part of the defendant. He had, in fact, fixed the amount of petitioner's bond at \$40,000; had informed petitioner, on his inquiry, that securities on his bond, out of the county, would be required to make affidavits of justification, &c., and that petitioner would be required to obtain the certificate of the judge of probate, that he was personally acquainted with said securities, and believed them to be worth the amounts for which they had respectively justified, &c.; and when all this was complied with on the part of petitioner, and his bond was tendered for approval, defendant refused to approve of the same, without stating

Ex parte Candee.

the above as a reason for his refusal. All this is stated in petitioner's petition, and not denied, and besides, defendant's eighth cause of return states that he told petitioner the amount of his bond would be forty thousand dollars. Furthermore, this part of defendant's return is utterly inconsistent and repugnant to the other parts of said return. If this was the true reason for refusing to approve of and file petitioner's official bond, then all the others are false, and the whole return is bad, for the court can not know which to believe.—See *The King v. The Mayor of Cambridge*, 2 T. R., *supra*.

The entire complexion of this return has irresistibly drawn the mind of the court to the conclusion, that the real cause for refusing to approve of petitioner's bond is yet undisclosed; that defendant's refusal looks to some ulterior object or purpose, which is carefully kept from the knowledge of the court. However this may be, the return is bad for uncertainty, insufficiency and repugnancy. The petitioner's demurrer, therefore, must be sustained, and the return must be quashed. A judgment on demurrer in such cases is final, and not *respondeas ouster*, but a peremptory *mandamus* issues.—32 Penn., *supra*.

It is, therefore, the order and judgment of this court, that petitioner's demurrer to the return of the defendant be sustained, and that said return be quashed; and that a peremptory *mandamus* issue, commanding the said John T. Cook, probate judge of the county of Wilcox, without delay, to approve of and file in his office the official bond of petitioner as sheriff of said county, tendered to him for his approval on the 22d day of November, 1871, being the same bond made an exhibit to, and a part of petitioner's petition in this behalf.

It is also ordered, that said John T. Cook, probate judge, &c., as aforesaid, pay the costs of this proceeding in this court.

SCOTT *vs.* THE STATE.

[INDICTMENT FOR ASSAULT WITH INTENT TO RAVISH.]

1. *Indictment for assault with intent to ravish; what prosecutrix can not state.*—In a prosecution for an assault with intent to ravish, the prosecutrix should not be allowed to say, in giving testimony, that the defendant attempted to ravish her, but did not accomplish his purpose. It is a conclusion of law.
2. *Same; what evidence not admissible on trial of.*—Nor is it competent for a witness for the State, on his examination in chief, to say that the prosecutrix, when making complaint to him, said certain scratches on her neck were made by the accused in attempting to ravish her, unless in corroboration of her testimony, if she be assailed in the matter of her complaint.

APPEAL from the Circuit Court of Wilcox.

Tried before Hon. P. O. HARPER.

The appellant, Cæsar Scott, was indicted for an assault with intent to ravish Sukey Sams. On the trial, she testified that "in September, 1871, she was attacked by the defendant, who attempted to ravish her, but he failed and did not accomplish his purpose." The defendant objected to this "answer," but his objection was overruled, and he excepted.

The State introduced a witness who testified, that "Sukey Sams complained to him, and that she had scratches on her neck."

The solicitor asked this witness "if, at the time of making this complaint, Sukey said how the scratches came on her neck." The defendant objected to the question, but the court overruled the objection, and defendant excepted. The witness answered, that Sukey told him "the defendant scratched her when he was trying to rape her." The defendant moved to exclude this answer from the jury, but the court overruled the motion, and he excepted.

The defendant was convicted, and sentenced to two years imprisonment in the penitentiary, and hence this appeal.

McCASKILL, for appellant.

ATTORNEY-GENERAL, *contra*.

B. F. SAFFOLD, J.—Whether or no “the prosecutrix was attacked by the defendant, who attempted to ravish her, but failed and did not accomplish his purpose,” was a compound question of law and fact determinable by both the court and the jury. The answer was as if, in a trial for murder, a witness should be allowed to say that the defendant *murdered* the deceased. The facts of the conduct of the accused only should have been stated.

Proof of complaint made by the prosecutrix, yes or no, is all that is admissible in the direct examination. The particulars may be inquired into by the defense, or in corroboration of the testimony by the prosecutrix, if she is assailed in the matter of her complaint. Of course it is competent to prove whatever circumstances and signs of injury she showed.—1 Russ. on Crimes, p. 688, and note c.

The judgment is reversed, and the cause remanded.

ADAMS vs. THE STATE.

[APPEAL FROM JUDGMENT OF CIRCUIT COURT ON MOTION TO RETAX COSTS.]

1. *Solicitor's fee; when properly allowed, as for a conviction of assault with weapon.*—If a party is indicted for an assault with intent to murder, with a pistol, knife or other weapon, and puts in a plea of guilty of a simple assault, his plea is an admission of charge as made, denying only the extent. In such a case, the solicitor's fee is fifteen dollars.
2. *Revenue law of 1868, section 136 of; what laws did not repeal.*—Section 136 of the revenue law of 1868 does not repeal the statutes in reference to the fees and costs of judicial litigation.

Adams v. The State.

APPEAL from the Circuit Court of Dallas.
Tried before Hon. M. J. SAFFOLD.

The defendant pleaded guilty of a simple assault, to an indictment charging an assault with intent to murder. The first count charged that the assault was made with a pistol; and the second, as having been made with a knife. The plea was received and a jury empaneled to assess the fine, which was fixed at \$25.00; and thereupon, the court rendered judgment against the defendant for the fine and costs of the prosecution, and ordered his retention in custody until the same were paid, or the defendant otherwise discharged by due course of law.

The defendant, afterwards, moved to retax the costs, objecting specially to the solicitor's fee of \$15, and the two dollars county tax contained in the bill of costs. In support of the motion, the defendant proved that no evidence was introduced as to the facts of the case, or to show that any stick or other weapon was used, when his plea of guilty of a simple assault was received.

The court overruled the motion, &c., and hence this appeal.

MORGAN, LAPSLEY & NELSON, for appellant.
ATTORNEY-GENERAL, *contra*.

PECK, C. J.—The defendant's plea admitted the assault as charged, denying only the intent. It was an admission that the assault was made with a weapon. Section 4343 of the Revised Code provides, that when the assault is with a stick or other weapon, the solicitor is entitled, on a conviction, to a fee of fifteen dollars.

The two dollars county tax was properly embraced in the bill of costs. Section 136 of the revenue law of 1868 did not repeal section 913 of the Revised Code, nor did it repeal the statutes in reference to the fees and costs of judicial litigation.

The judgment is affirmed, at the costs of appellant.

EX PARTE BROOKS.

[APPLICATION FOR MANDAMUS.]

1. *Suspension of proceedings under act to suppress murder, lynching, &c., approved December 28, 1868; when proper.*—The arrest and putting on trial of one of several offenders, on the charge about which suit is brought against a county, under the provisions of section 6 of "An act to suppress murder, lynching, and assaults and batteries," approved December 28th, 1868, authorizes, under the provisions of section 7 of the same act, a suspension of proceedings in the suit against the county, until the result of the apprehended person's trial shall be known.

Section 6 of the act "to suppress murder, lynching, and assaults and batteries," approved December 28th, 1868, provides, in substance, that if any person be whipped, beaten, or wounded, "to force such person to leave the neighborhood, or for any cause, by two or more persons unknown, or persons in disguise, not unknown or in disguise," &c., the person so injured may recover one thousand dollars by suit against the county in which the offense occurred, &c.

Section 7 of the same act provides, "that if at any time before the payment of the money, recoverable under any section of this act, *the offenders* shall be apprehended and duly tried, convicted and punished, such conviction and punishment shall operate as satisfaction of the judgment in the particular case. If the *offenders* herein described shall be apprehended and undergoing trial for the offense about which the suit is brought, the court, or in vacation the presiding judge, may, on a proper showing, suspend proceedings in the suit for damages until the result of the trial of the apprehended person shall be known."

The petitioner, Ferrin Brooks, brought suit against the county of Cleburne, under the provisions of section 6 of the act above quoted, alleging in his complaint that he had

Ex parte Brooks.

been beaten by a party or band of twenty-five disguised persons, &c. When the case was called for trial, the attorneys for the county suggested that "N. C. Hudgins was indicted, arrested, and now undergoing trial for the offense of being one of the party who committed the offense for which your petitioner brought suit." The truth of the suggestion being admitted, the court suspended proceedings in the case until the result of the trial of Hudgins should be known. The petitioner excepted to this ruling, and took a bill of exceptions, and now prays for a *mandamus* to compel the presiding judge of the circuit court to set aside the order suspending proceedings, &c., and to proceed with the trial of the cause, &c.

JAMES AIKIN, for petitioner, contended that the apprehension, &c., of "one" of a band of *twenty-five*, was no cause for suspending the proceedings in the suit; that this would not satisfy either the spirit or letter of the statute. That being strictly a statutory proceeding, parties seeking to avail themselves of its provisions must bring themselves strictly within the letter of the statute, which provides for suspension only when the "*offenders*" are arrested.

B. F. SAFFOLD, J.—Section 7 of the act to suppress murder, lynching, &c., approved December 28th, 1868, authorizes the suspension of proceedings in the suit for damages, when the offenders shall be apprehended and undergoing trial, until the result of the trial of the apprehended person shall be known. It is not necessary that more than one of the offenders shall be undergoing trial. The proceedings are to be suspended whenever the proper facts are made known to the court or judge.

The *mandamus* is refused.

GAMBLE, ADM'R, vs. DUNKLIN & CO.

[APPEAL FROM ORDER ALLOWING CLAIM AGAINST INSOLVENT ESTATE.]

1. *Insolvent estate; what claims against, must be filed to prevent bar prescribed by section 2196 of Revised Code.*—All claims on an insolvent estate, *not in suit* at the time the same is reported and declared insolvent, must be filed in the office of the judge of probate and verified, as required by section 2196 of the Revised Code, whether or not in judgment, either against the deceased or the personal representative; otherwise, they are forever barred. A judgment obtained before the report and declaration of insolvency, not being a claim *in suit*, is barred if not filed and verified within the time and in the manner prescribed in that section.
2. *Same.*—Claims *in suit* against the executor or administrator at the time the estate is reported and declared insolvent, must proceed to judgment, and if judgment be for the plaintiff, and it is shown to the court that the estate has been declared insolvent, an order must be made to the effect that no execution issue on such judgment, but that the same be certified to the proper probate court; and upon a certified copy of such judgment being filed as a claim against the estate, it must be allowed, with the costs against such estate; unless such judgment be shown to have been obtained by collusion. But such judgment need not be filed and verified under said section 2196.

APPEAL from the Probate Court of Butler.

Tried before Hon. H. W. WATSON.

The facts are sufficiently stated in the opinion.

JUDGE & BOLLING, and GAMBLE & POWELL, for appellant.
HERBERT & BUELL, *contra*.

PECK, C. J.—The Revised Code, ch. 7, p. 457, provides a system for the settlement of insolvent estates, and the payment of debts, and prescribes the proceedings to be had in such cases. Section 2196 of this chapter provides, that “every person having *any claim* against the estate declared insolvent, must file the same in the office of the judge of probate, within nine months after such declara-

tion, or after the same accrues, verified by the oath of the claimant, or some other person who knows the correctness of the claim, and that the same is due, or it is barred forever; but when a claim is filed by an executor, administrator, guardian, or other trustee, that he believes the claim to be just, due and unpaid, and in all cases where a claim is verified under this section, the defect or insufficiency may be supplied by amendment or proof, at any time before a final decree."

The language of this section is broad enough to embrace all claims, of every description, against an insolvent estate, whether or not in judgment, either against the deceased or the personal representative, or in suit in process of collection, and would embrace them and require them to be filed and verified as therein provided, or be forever barred, were it not for other sections in the same chapter having reference to claims *in suit and being litigated* when the estate is reported insolvent. Section 2207 enacts, that "during the progress of any suit against an executor or administrator, he may show that such estate has been *reported insolvent*, and continue the cause until the *final disposition of such report*." Section 2208 declares, that "the executor or administrator may also, at any time before judgment, plead specially that the estate has been declared insolvent, and in such case, the other issues must be tried and judgment rendered thereon." The next section, 2209, provides, that "if such judgment is for the plaintiff, and it is shown to the court that such estate has been declared insolvent, an order must be made to the effect that no execution issue on such judgment, but that the same be certified to the proper probate court; and upon a certified copy of such judgment being filed as a claim against the estate, *it must be allowed*, with the costs, against such estate, unless shown to have been obtained by collusion."

By these three sections, we see that the only claims excepted out of the influence of said section 2196, are claims actually in suit at the time the estate is reported insolvent, and on which, after the estate is declared insolvent, judgment is recovered by the plaintiff, and which judgment, under the

order of the court, is certified and filed in the proper probate court as a claim against the estate. If this be done, then said section 2209 expressly declares it must be allowed, with the costs, against such estate, unless the judgment is shown to have been obtained by collusion.

Such a claim need not be filed in the office of the judge of probate within nine months after the estate is declared insolvent, nor be verified as required by said section 2196; but all other claims of every description, if not filed and verified as therein required, are forever barred. Construing these several sections together, and in connection with the entire chapter, the foregoing seems to me to be their plain, manifest meaning, and, without conflict, to harmonize them with each other and with the system provided for the settlement of insolvent estates.

Claims required to be filed and verified by section 2196 are to be construed, and their correctness ascertained and determined, in the manner provided in section 2203 of said chapter; but the correctness of claims in suit, when the estate is reported and declared insolvent, are to be settled and determined in the manner prescribed in said sections 2207 and 2208. Claims belonging to either class, when their correctness is determined in the way respectively provided, stand upon the same footing, and on the settlement of the estate, the court must decree to each creditor whose claim has been settled and allowed, in either way, his proportion of all moneys in the hands of the executor or administrator for distribution. In the case of *Erwin, Ex'r, et al. v. McGuire et al., Adm'rs*, (44 Ala. 499,) it is decided, that "it is not necessary to file in the probate court a claim on which suit was commenced prior to the declaration of insolvency of the debtor's estate." The converse of this must, necessarily, be true, whether the claim has or has not, before that time, been reduced to judgment. In this case, the claim allowed against the objections of the appellant, consists of a judgment recovered against the administrator in chief, on the 5th day of October, 1867.

The estate was afterwards declared insolvent, on the report of appellant, the administrator *de bonis non*, on the

David v. Malone.

25th day of March, 1868, and said claim was not filed in the office of the judge of probate until the 14th day of February, 1871, and not verified until the 10th day of June thereafter. Thus, we see, that this claim was not in suit when the estate was reported and declared insolvent, and was not verified and filed in the office of the judge of probate for nearly three years thereafter. By the plain letter of said section 2196 it was then barred, and the probate court should so have decided.

The judgment is reversed, and the cause remanded, &c., at appellee's cost.

DAVID *vs.* MALONE.

[ACTION AGAINST SURETY ON PROMISSORY NOTE.]

1. *Charge to jury; what erroneous.*—A charge which assumes the truth of evidence, and withdraws the consideration of its credibility from the jury and instructs them that they must find for the defendant, is an invasion of the province of the jury, and necessarily erroneous.
2. *Principal debtor; what contract with, by creditor, will not discharge surety unless injury is shown.*—A creditor, having instituted suit against the principal debtor and his surety, afterwards, without the knowledge or consent of the surety, agreed with the principal, that on his paying a portion of the interest due and the costs, to dismiss the suit and indulge him further, without specifying any day or time to which indulgence was to be given. The agreement was carried into effect and the suit dismissed. The principal debtor was afterwards adjudged a bankrupt, and obtained a discharge before the present suit,—*Held*, that the surety was not thereby discharged, unless he was in fact injured by the agreement between the principal debtor and the creditor.

APPEAL from the Circuit Court of Limestone.
Tried before Hon. W. J. HARALSON.

The opinion states all the facts of the case.

WALKER & JONES, for appellant.

WALKER & BRICKELL, *contra*.

PECK, C. J.—There are cases in which it is difficult to determine whether they fall on the one or the other side of the line between right and wrong. These cases not unfrequently arise, where sureties seek to be relieved or claim to be discharged from their liabilities, by some act or omission on the part of creditors.

The general rule is, that if a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety,—in all such cases, the surety will be discharged, and he may set up such defense to any suit afterwards brought against him, if not at law, at all events in equity.—Story's Eq. § 325.

In the case of *The People v. Jansen*, (7 J. R.,) it is decided that the facts being ascertained, the defense can as well be made at law as in a court of equity.—See, also, *Pain v. Packard*, 13 J. R.

Where the creditor by contract extends the time of payment to his principal debtor, without the consent of the surety, the surety is discharged; but to have this effect, the contract must be founded upon a good consideration, must be a contract that deprives the creditor of his legal right to proceed against the principal debtor for some period, however limited; and this is so, whether the delay has operated to the prejudice of the surety or not.—*Haden et al., Ex'rs, v. Brown*, 18 Ala. 641. But a surety has a right to stand upon the precise terms of his contract, and any alteration made therein without his consent, either in its terms or mode of performance, will exonerate him from his liability.—*Mackay & McDonald v. Dodge & McKay*, 5 Ala. 388; *Wicher v. Hall*, 5 B. & C., 269.

Mere delay, however, on the part of the creditor, to call on the principal debtor for payment, or his omission to use any active diligence to collect his debt, will not discharge

his surety.—*King v. Baldwin*, 2 J. Ch. Rep. 554. Where there is no notice on the part of the surety, requiring the creditor to sue the principal, a delay to sue, or even a discontinuance of a suit already brought against the principal, will not absolve the surety from his liability, if he is passive and takes no measures to indicate to the creditor that he insists on his proceeding against the principal.—*Fulton v. Matthews & Wedge*, 15 J. R. 433.

The difficulty does not lie in the general rule; that is plain enough, but in its application to the peculiar and varying circumstances of particular cases. The creditor is, in all subsequent transactions with the principal debtor, bound to entire good faith to the surety. If any stipulations are made in reference to the debt between the creditor and the principal, which are not communicated to the surety, and which are inconsistent with the terms of his contract, or prejudicial to his interests therein, they will operate as a discharge of the surety from the obligation of his contract.—1 Story's Eq. § 324.

The present case, as it is presented in the bill of exceptions, may be stated as follows: This action was commenced by appellant in 1869, against appellee, founded on a lost note made by Benj. F. Bell and appellee, payable to Wm. H. Yarborough, which had been assigned to plaintiff. Appellee, the defendant, pleaded that he made said note as the surety of Bell, and averred that after said note was due and payable, the said plaintiff, upon a new and valuable consideration paid by said Bell, agreed with him to dismiss a suit then pending on said note against said Bell and himself, and to give him day of payment, and did, in pursuance of said agreement, dismiss said suit, and extend the time for the payment of said note, and that this was done without his knowledge or consent, and to his damage and injury.

On the trial, after the plaintiff had proved the making of said note, its assignment and loss, &c., the defendant introduced said Bell as a witness, who testified that defendant executed said note as his surety, and that on the 2d day of March, 1867, a writ was issued on said note against

David v. Malone.

himself and defendant, his surety; that said suit was afterwards dismissed by plaintiff, under an agreement with him, without the knowledge or consent of defendant; that he agreed to pay plaintiff some interest, which was then due, and the costs of said suit; that he paid plaintiff ten dollars, which did not extinguish the interest which was then due, and the costs of said suit, the plaintiff agreeing to indulge him further, without specifying any time or day to which she would indulge him; that said suit was dismissed, in vacation, under section 2675 of the Revised Code, without notice to defendant and without his consent. He further stated, that if said suit had progressed to judgment, he had property sufficient, exempt from execution, to have satisfied said judgment; that afterwards, on the — day of —, 1867, he was, on his own petition, adjudged a bankrupt; that suit against him was never renewed, but long after said suit was dismissed, and after he had become a discharged bankrupt, this suit was brought against defendant alone. This was all the evidence, and the court, at the request of the defendant, charged the jury, "that the dismissal of said suit by plaintiff, under said agreement, without notice to the surety, the said James M. Malone, discharged the surety from all further liability on said lost note, and they must find for the defendant."

This charge is erroneous. It assumes the truth of the evidence, and withdraws from the jury the consideration of its credibility, and instructs them that they must find for the defendant. This was a clear invasion of the province of the jury.—*Huff et al. v. Cox*, 2 Ala. 310; *Brooks v. Hildreth & Moseley*, 22 Ala. 469; *Whitsett, Garner & Co. v. Slater*, 23 Ala. 626; *Foust v. Yielding*, 28 Ala. 658.

For this error the judgment must be reversed; but as, on another trial, the question as to the legal effect of this evidence will necessarily arise, and under a proper charge of the court have to be considered and disposed of by the jury, we will proceed to express our opinion of it; and, in the first place, we are not prepared to say said alleged agreement, in the language of some of the cases, tied up the hands of the plaintiff, so that she could not immediately

David v. Malone.

have commenced another action against the principal debtor, Bell; we are inclined to believe she might have done so. The agreement, strictly speaking, did not require her to indulge him for any particular time; it is altogether indefinite as to this matter. Good faith, however, on the part of the plaintiff, required her to indulge him some reasonable time, and no doubt both parties so understood it, as we see she did indulge him, until he was adjudged a bankrupt and discharged from all obligation to pay said note.

The agreement was not illegal, nor without consideration, and was carried into effect by both parties. Bell paid a portion of the interest due on said note, and the costs of said suit, and the same was dismissed, and indulgence was, in fact, granted by the plaintiff, without the knowledge of the surety. This must be regarded as a discharge of the surety's liability. Besides, if notice had been given to the defendant, he might, and probably would, have objected to the dismissal of the suit without being relieved from his liability as surety. Section 3074 of the Revised Code permits a surety, by notice in writing, to require the creditor to sue the principal, and to prosecute the suit with diligence, according to the ordinary course of law, and if he fails to do so, the surety is discharged. If the plaintiff had given the defendant notice of said agreement, and of his intention to dismiss said suit, and the defendant had objected, and, in writing, required the plaintiff to continue to prosecute the same, and he had declined to do so, the defendant would have been within the equity of said section, and entitled to all its benefits. Every principle of good faith entitled the defendant, we think, to this notice, that he might have taken the necessary steps to protect himself.

We will not stop to speculate whether the defendant was, in reality, injured or prejudiced by the course pursued by the plaintiff; it is enough, that it was inconsistent with that entire good faith which ought to have been observed on his part towards the defendant; and in all such cases injury may fairly be presumed.

For the error in the charge of the court, the judgment is

Commissioners Court of Limestone County v. John D. Rather et al.

reversed, and the cause is remanded for a new trial. The appellee will pay the costs.

NOTE BY REPORTER.—At a subsequent day of the term, applied for a rehearing. The application did not come into the Reporter's hands. The application was responded to in a *per curiam*, as follows:

We are indisposed to grant a rehearing in this case, but considering the peculiar circumstances of the case, we will add, that unless, on another trial, it is made to appear that the defendant in fact was injured by the alleged arrangement between the plaintiff and the principal debtor, he ought not to be held discharged from his liability as surety. With this modification of the opinion, the rehearing is denied.

COMMISSIONERS COURT OF LIMESTONE COUNTY vs. JOHN D. RATHER ET AL.

[APPEAL FROM ORDER GRANTING MANDAMUS.]

1. *Time when act is to be performed; when directory merely.*—A statute prescribing a period of time within which public officers are to perform official acts regarding the rights of others, will, as to third persons, be held to be *directory* merely, and not to invalidate or prevent official acts after the expiration of the specified time, unless the nature of the act to be performed, or the spirit of the statute, force a contrary conclusion.
2. *Same.*—Where a statute (under which a county issued bonds, a series of which fell due annually for a period of ten years,) provided that "as soon as" certain prescribed conditions were complied with, "*and annually thereafter, for a period of ten years,*" the court of county commissioners should levy and assess a tax sufficient to pay the series falling due each year, it was held, that the failure to assess and collect the tax within the time prescribed, did not thereafter limit or destroy the power to levy and collect the tax, but that the power existed as long as the legal obligation to pay the debt subsisted.

Commissioners Court of Limestone County v. John D. Rather et al.

3. *Contracts; law as to enforcement of remedy, how can not be changed.*—The law in force at the time and place of making a contract, and when it is to be performed, becomes part of the contract both as to its stipulations and the remedy provided for their enforcement. After the contract is thus entered into, subsequent legislation can not change the remedy so as to impair the obligation of the contract as it stood at the time it was entered into.
4. *Bonds issued by county of Limestone under act of December 14, 1855; create valid obligations against the county, the payment of which will be enforced by mandamus.*—The bonds issued by the court of county commissioners of Limestone county, under the act entitled "An act to authorize the commissioners court of Limestone county, State of Alabama, to subscribe to the capital stock of the Tennessee and Alabama Central Railroad Company," passed over the veto of the governor on the 14th December, 1855, create a valid debt against the county, which are not required to be presented for allowance to the commissioners court; and the commissioners court, refusing to levy and assess a tax, as authorized by law, to pay the bonds, were compelled to do so by *mandamus*, which was held to be the appropriate remedy to enforce the payment of the bonds.

APPEAL from the Circuit Court of Limestone.

Trid before Hon. W. B. WOOD.

This was an appeal by McClellan, judge of probate, and Kimball, Hine and Bullington, commissioners, &c., composing the court of county commissioners of Limestone, from an order awarding, on a petition filed April 21st, 1866, by John D. Rather and other bondholders, a peremptory *mandamus* compelling the individuals composing the court of county commissioners of Limestone to assess and levy a sufficient tax to pay certain bonds mentioned in the petition, and interest thereon, issued by Limestone county in payment of a subscription of stock of the Tennessee and Alabama Central Railroad Company.

The bonds in question were issued under authority of an act of the general assembly, passed by the constitutional majority over the veto of Gov. Winston, on the 14th of December, 1855, and so much of which as is necessary to a proper understanding of the case is set forth in full. These portions of the act are as follows:

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That in pursuance of the wishes of the people of*

Commissioners Court of Limestone County v. John D. Rather et al.

Limestone county, as expressed at an election held for that purpose, on the first Monday in May, 1854, and also reaffirmed at the recent election for representatives in the general assembly, held on the first Monday in August, 1855, that the court of county commissioners for said county of Limestone, be, and they are hereby authorized, empowered and required, for and in behalf of said county, to subscribe for stock in the Tennessee and Alabama Central Railroad Company, to the amount of two hundred thousand dollars, to be raised in the manner, and upon the condition hereinafter mentioned.

* * * * *

SEC. 3. *Be it further enacted*, That as soon as the conditions set forth in the succeeding sections of this act are fully complied with, it shall be the duty of the court of county commissioners of Limestone county to take the steps hereinafter prescribed, and all the necessary and proper steps for the purpose of raising annually the sum of twenty thousand dollars, until the sum of two hundred thousand dollars shall be raised, to be applied to the construction of that portion of the Tennessee and Alabama Central Railroad which shall be in Limestone county, to-wit: From some point at or near Decatur to the northern line of said county, where it shall be intersected by a railroad to be constructed thence in the direction of Pulaski and Columbia, Tennessee, styled the Central Southern Railroad, and on no account shall the funds raised by virtue of this act, or any part of them, be otherwise appropriated.

SEC. 4. *Be it further enacted*, That no assessment or levy of taxes shall be made by virtue of this act, until (I) an amount of good and solvent subscriptions shall be made to the capital stock of said company, which, including the two hundred thousand dollars raised by virtue of this act, shall be sufficient, according to the estimate of a competent engineer, based upon an accurate and thorough survey of said route, to construct a railroad track across the county of Limestone as hereinbefore specified, nor until (II) the grading of the Central Southern Railroad of the State of

Commissioners Court of Limestone County v. John D. Rather et al.

Tennessee is let to contract, or the court of county commissioners of Limestone county are satisfied from other reasons that the said Central Southern Railroad will be constructed, nor until (III) the president of said Tennessee and Alabama Central Railroad Company shall have made affidavit before the probate judge of Limestone county, that the bonds or money to be received by him under the provisions of this act, shall be solely and faithfully applied to the construction of said road within the limits of Limestone county, and the private property of the president, who first makes the affidavit, shall be liable to the county of Limestone for the misapplication of said bonds or money, made during his term of office, and his successors in office shall each, for his own misapplication, be similarly liable.

SEC. 5. *Be it further enacted*, That as soon as the three preceding conditions are complied with, and annually thereafter for a period of ten years, it shall be the duty of said court of county commissioners to assess such a per centum tax on the State tax of that year, and each succeeding year for the period above mentioned, as shall raise the sum of twenty thousand dollars annually, and the same shall be collected in the same manner as the State and county taxes are collected.

* * * * *

SEC. 8. *Be it further enacted*, That as soon as the conditions set forth in section 4 of this act are complied with, it shall be the duty of the court of county commissioners of said county to issue and deliver to the president and directors of the Tennessee and Alabama Central Railroad Company, county bonds for the sum of two hundred thousand dollars, payable in ten equal annual installments, on the first day of March of each year thereafter, at the office of the probate judge of said county, or elsewhere, as the said court may deem best; and the said court shall have authority to make said bonds for any amount they may think proper, not exceeding one thousand dollars, nor less than five hundred dollars; *Provided*, however, that the aggregate amount of bonds payable in any year, shall not, except on the contingency mentioned in the succeeding

Commissioners Court of Limestone County v. John D. Rather et al.

section of this act, exceed nor fall under the sum of twenty thousand dollars; the said bonds shall be signed by at least a majority of the court of county commissioners, and in the presence of the probate judge, who shall certify that fact under his seal of office upon the bond; and the said bonds shall bear no interest, unless by default of the county they shall not be paid when presented at maturity.

SEC. 9. *Be it further enacted*, That the court of county commissioners aforesaid, shall endeavor to make such assessment each year as shall raise the exact sum of twenty thousand dollars; but in case the amount assessed and collected shall be either more or less than that sum, the amount to be assessed the next year shall be increased or diminished by the excess or deficit of the preceding year.

* * * * *

SEC. 19. *Be it further enacted*, That any member of said court of county commissioners refusing to carry out the provisions of this act, or failing to attend the meetings of said court purposely to defeat the execution of this act, shall be subject to all the penalties, fines and forfeitures now in force for failure to perform his duties as a member of said court, and in addition thereto, he shall be liable to pay said company all such damages as it may have sustained on account of such wrongful refusal or absence.

SEC. 20. *Be it further enacted*, That the court of county commissioners aforesaid shall have power and authority to do all and other acts and things, not inconsistent with the provisions of this act, which may be necessary and proper to give full effect to the objects and provisions of this act.

On the 8th of February, 1858, the general assembly passed an act "to authorize the sale of the bonds of the county of Limestone," the first section of which, omitting the enacting clause, was as follows:

"That the bonds of the county of Limestone, issued by the court of county commissioners of said county, in aid of the Tennessee and Alabama Railroad Company, under an act of the legislature of the State of Alabama, passed December 14, 1855, entitled an act to authorize the court of county commissioners of Limestone county, State of

Commissioners Court of Limestone County v. John D. Rather et al.

Alabama, to subscribe to the capital stock of the Tennessee and Alabama Central Railroad Company, be and the same are hereby made transferable either by endorsement or delivery."

The petition for *mandamus* shows the organization and existence of the Tennessee and Alabama Central Railroad Company, a full performance, in accordance with the provisions of the act of December 14th, 1855, of all the conditions precedent to the issuance of the bonds; their execution and delivery to the Tennessee and Alabama Central Railroad Company, and a sale of the bonds to the petitioners for a valuable consideration in the year 1858. It was also shown that the petitioners had duly presented their bonds to the commissioners court and demanded payment thereof, and also that a sufficient tax be levied and assessed to pay the same and interest thereon, in accordance with the act of December 14th, 1855; and that the commissioners court refused to levy and assess any tax on the ground that, under the act under which the bonds were issued, the time in which the commissioners court was authorized to levy and assess said tax had expired. A demand was also made upon the tax collector for payment of the bonds, &c., and he likewise refused. The time when these demands were made is not stated in the petition. It is also alleged that the *mandamus* prayed for was the only adequate remedy whereby petitioners could enforce their rights, &c., in the premises.

The cause was tried in the court below on an agreed state of facts, in which it was admitted—1st. That the act of 14th December, 1855, is the law under which the bonds now in controversy were issued, and also the law by and under which said bonds are to be paid off and discharged. 2d. That all of the terms, conditions, stipulations and requirements of said law, except as hereinafter stated, were duly and properly done, discharged and performed by those whose duty it was to discharge and perform them. 3d. That said bonds, to the amount of two hundred thousand dollars, were issued by said court of county commissioners, under and by virtue and in strict compliance with and con-

Commissioners Court of Limestone County v. John D. Rather et al.

formity to the provisions of said law, and said bonds were, by said court, as by said law required, delivered to the president and directors of the Tennessee and Alabama Central Railroad Company. 4th. That the said Tennessee and Alabama Central Railroad Company, under and by virtue of an act of the general assembly of Alabama, approved February 8th, 1858, sold, negotiated, transferred and delivered, for a valuable consideration, said bonds to various persons. 5th. That the bonds mentioned in the petition as having been sold to Rather and others, have been sold and transferred to the said John D. Rather, and other persons named, and the same are justly due and unpaid. 6th. That the said bonds of the said John D. Rather and others who are interested with him in this proceeding, have been duly presented to said court of county commissioners, and also to the tax collector of said county for payment, and by both payment was refused. Said bonds were also presented to said court, and said court applied to and asked to assess and levy the tax provided for by said law for the payment of said bonds, which application the said court refused to grant, &c., for the reason that section 5 of the act of 1854 provided for the assessment of said tax annually for ten years, and as the ten years have elapsed and some of the bonds are yet unpaid and outstanding, as aforesaid, the court feels that its authority to assess said tax ceased with the expiration of the ten years, and that said court now has no authority to make said assessment. 7th. That the first assessment under said law was for bonds falling due 1st March, 1858; assessment was made in 1857. 8th. That for and during some of the years of the late war between the northern and southern States, to-wit, the years 1864 and 1865, no assessment of said annual tax was made by said court, upon the alleged ground and for the reason that the county of Limestone aforesaid was within the Federal military lines and under the Federal military rule, and during those years said court could not, and did not, make said required assessment. In some of those years above named there was no probate judge for the county of Limestone, and in some there was no court of county commis-

Commissioners Court of Limestone County v. John D. Rather et al.

sioners for said county, and in some of said years both the probate judge and the court of county commissioners⁷ were prevented from discharging their respective functions, including the assessments aforesaid, because of the condition of the country, growing out of the Federal military rule aforesaid, so that said assessments were not made for said years because of a public war, and also for the other reasons above given. 9th. That all of said bonds were issued on and dated 14th February, 1857; twenty thousand dollars of them made payable on the 1st March, 1858, and the same amount payable 1st of March of each year thereafter, up to and including the year 1867.

The court awarded a *mandamus* as prayed for, and hence this appeal.

WATTS & TROY, WOODS & CHILTON, WALKER & BRICKELL, and B. A. McCLELLAN, for appellants.

[Appellants' brief did not reach the Reporter.]

W. H. WALKER, HOUSTON & PRYOR, and R. W. WALKER, *contra*.

R. W. WALKER, for appellees, made the following points: 1. A statute specifying a time within which a public officer is to perform an official act affecting the rights of others, is directory merely, as to the time within which the act is to be done, unless from the nature of the act or the phraseology of the statute, the designation of the time must be considered a limitation on the power of the officer.—22 Ala. R. 126; 6 Wend. 486-7-8; 3 Mass. 230-2; 5 Cowan, 269; 10 Ala. 107-8; 26 Ala. 619; Dwarris, 222-3; 18 N. Y. 200.

2. By this it is not meant that a duty does not rest upon the officer to act within the time, a duty which he may be compelled to perform, but simply that his power to act does not expire with the time.—*Stickney v. Huggins*, 10 Ala. 106, 108; *Webster v. French*, 12 Ill. 302.

3. When a statute directs an officer to do a thing in a

Commissioners Court of Limestone County v. John D. Rather et al.

certain time, without any negative words restraining him from doing it afterwards, the naming of the time will not be construed as a limitation of his authority.—Dwarris, p. 223; *Ex parte Heath*, 3 Hill, 42; *People v. Holley*, 12 Wend. 486; *Gale v. Mead*, 2 Den. 232; *Barnes v. Badger*, 41 Barb. 98-9; *People v. Cook*, 14 Barb. 290; *S. C.*, 8 N. Y. 67; *Miller v. Finkle*, 1 Parker's Cr. R. 374; 29 Md. R. 516.

4. This act does not contain negative words prohibiting a tax after ten years, and therefore is not a limitation of power.—Authorities, *supra*.

Where there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before, no presumption that allowing it to be so done may work an injury or wrong, nothing in the act itself or other acts relating to the subject, indicating that the legislature did not intend that it should rather be done *after* the time prescribed than not to be done at all,—there the courts assume that the intent was, that if not done within the time prescribed, it might be done afterwards.—*State v. McLean*, 9 Wis. 292; *Dwar.* 225.

5. The argument that the fifth section of the act is a limitation of the power of the commissioners court to levy a tax, proceeds upon an erroneous view of the purpose of that section. The imposition upon the court of *the duty* to levy a tax of \$20,000 annually for ten years, was intended for the benefit of the bondholders, not of the county. The county could not be called on to pay the bonds until they fell due. The period of their maturity was stipulated on their face. This was all the protection the county needed. The imposition of the duty to levy annually a tax sufficient to meet and pay off the bonds as they matured, was intended to give a marketable value to the bonds, and so facilitate their negotiation.—See *Stickney v. Huggins*, 10 Ala. 108.

6. If the provision referred to was designed as a limitation of the authority of the court to provide the means of paying off the bonds, so that the authority so to provide should terminate unless exercised strictly within the peri-

Commissioners Court of Limestone County v. John D. Rather et al.

ods designated, the very feature of the law which was intended to give currency to the bonds, would have effectually destroyed their value in the market. These bonds were negotiable securities in the highest sense.—*Mercer County v. Hackett*, 1 Wallace, 83, 95; *Woods v. Lawrence County*, 1 Black. 386; *White v. Vermont County*, 21 How. 545.

7. If the 5th section is a limitation of the power to tax, the failure of the county to perform the prescribed duty operates virtually an extinguishment of the debt. If the county has no power to levy taxes to pay off the bonds, it is, and will always remain, without the means to discharge them. The creditor has no remedy to coerce the payment. It is idle to say that the obligation of the county is not impaired by a denial of its right to raise by taxation the funds necessary to discharge it. There can be no debt without a right to enforce payment.

8. By the 8th section the court of county commissioners was directed to issue and deliver the county bonds for \$200,000, payable as therein directed. When issued, these bonds became valid obligations of the county, which can only be discharged or extinguished by payment.

The authority given by the 8th section to issue these bonds carried with it the power to levy the taxes necessary for their redemption.—*Gibbons v. Mobile Co.*, 36 Ala. 440; *People v. Brennan*, 39 Barb. 522; 1 Wall. 272; *Ex parte Selma & Gulf R. R. Co.*, 45 Ala. 730.

What is implied in a statute, is as much a part of it as what is expressed.—*United States v. Babbitt*, 1 Black. 61; *Gelpcke v. Dubuque*, 1 Wall. 221; see, also, section 20 of the act.

9. The general power to levy all taxes which should become necessary to redeem the bonds, necessarily implied by the grant of the authority to issue the bonds, is not limited or restricted by the other provisions of the act making it the duty of the court to levy certain taxes within named periods.—See, particularly, *Lucas v. Pitney*, 3 Dutch. 221; *Mobile & C. P. R. R. Co. v. Talman*, 15 Ala. 472; *Allen v. Montgomery R. R. Co.*, 11 Ala. 437.

10. On the failure of the court to perform the duty pre-

scribed within the limited time, the general power to provide by taxation the means required to redeem the bonds, necessarily involved in the authority to issue the bonds, may be invoked. On the demand of the bondholder, it is the duty of the court to exercise it. It is no answer to this demand, to say that the power of the court to provide the means for paying the bonds has been destroyed by the failure of the court to perform the special duty imposed upon it by the statute within the exact period prescribed by the statute. Such a proposition is inconsistent with reason and justice. It is allowing a party to take advantage of his own wrong.

11. In 1863-4-5, there was in the county no authority legally competent to perform the duty imposed by the act. Is it possible that in consequence of this the debt has been virtually discharged, by the termination of the authority of the county to provide the means of paying it?

12. The general power of taxation for the purpose of paying the bonds, necessarily implied by the 8th section, is as much a part of the act as the special duty imposed on the court by the 5th section, (authorities, *supra*,) and that general power, and the duty arising out of it, survive the failure of the court to perform the special duty enjoined by the 5th section.

13. If it is said that the power of the court to tax is limited to \$20,000 in any year, (under the 5th and 9th sections,) it may be answered, that this limitation is confined to levies made within the ten years, in exact performance of the special duty enjoined by the act. Moreover, under section 9, any deficit in one year is to be made up in the collection of the succeeding year. Now, if no part of the \$20,000 was collected in 1859, the court would have had to collect \$40,000 in 1860; and if nothing was collected in 1860, the whole deficit would have to be made up in 1861; and so, the levy in that year must have been for \$60,000 and over.

14. If this is not so, then the requirement that the court shall levy \$20,000 each year, is a limitation of the authority to that year, and if the year expires without a performance of that duty by the court, the power to levy the tax for the

Commissioners Court of Limestone County v. John D. Rather et al.

payment of the bonds falling due that year is gone. Indeed, if it be true that the whole authority to tax is lost by the expiration of the period of ten years, it must follow that the authority to make the annual levy is lost, unless exercised within the year prescribed.

This is not the law. Where a county is authorized to levy a sufficient tax *annually* to pay *coupons* as they fall due, the failure to levy the tax within the year does not terminate the power, and the county will be compelled by *mandamus* to levy afterwards a sufficient amount to pay all the *coupons* in arrears, though the amount necessary for that purpose may greatly exceed the amount required to pay the coupons falling due in any one year.—*Von Hoffman v. Quincy*, 4 Wall. 535–6; 6 Ohio St. R. 280–4; 21 How. 303; 2 Metc. (Ky.) 56, 81; 6 Wall. 193.

15. In the cases cited by appellants' counsel from 20 Md. 449, 14 Ind. 306, 7 Conn. 550, 1 H. & J. 359, 14 Ill. 223, the tax authorized was simply for local, public purposes; *i. e.*, for the uses of the corporation. Here the element of making provision to pay a debt to third persons is super-added. In the one case, there is no power except what is expressly conferred, and that is limited in time, the use passing with the time. In the other, the special duty imposed is not the sole power granted, and is intended merely as an additional security to the creditor. The failure to perform this special duty does not extinguish the debt, or affect the duty, or destroy the power of the debtor, to provide the necessary means for its payment.

The *mandamus* prayed for was for a levy sufficient to pay the bonds and interest remaining unpaid; and such, in substance, was the *mandamus* ordered.

PETERS, J.—No question was made on the argument at the bar as to the legality of the bonds in controversy in this suit. It is understood that this was admitted, and that they created a legal debt against the county of Limestone, *which ought to be paid*. But it was insisted by appellants that *mandamus* was not a proper remedy to enforce their collection, and that the court of county commission-

ers of Limestone county had no authority to levy a special tax for their payment; that the power given by the act of the legislature to issue the bonds and to levy a tax for their payment was a special authority, which was limited both in the manner and the time of its execution; that such limitations were peremptory, and not merely directory; and they can not be disregarded in the exercise of the authority conferred. This raises the sole question in the case. But before I proceed to discuss it, it may be proper to remark that it is the opinion of the court, that the bonds in controversy in this case, which were issued by the court of county commissioners of Limestone county, under the act of the general assembly of this State, entitled "An act to authorize the court of county commissioners of Limestone county, State of Alabama, to subscribe to the capital stock of the Tennessee and Alabama Central Railroad Company," passed over the veto of the governor, on the 14th day of December, 1855, *create a valid debt against said county, so far as the same remain unpaid*. When bonds are so issued by the county under authority of law, and in conformity with law, the rule of judicial decision is abundant and emphatic, that *debts so created can not be repudiated*.—

County Commissioners of Knox County, Indiana, v. Aspenwall et al., 21 How. 539; *Woods v. Lawrence County, Pennsylvania*, 1 Black, 386; *Thompson v. Lee County, Iowa*, 3 Wall. 327; *Gelpeke v. City of Dubuque*, 1 Wall. 175; *Mitchell v. Burlington*, 4 Wall. 270, 274; *Campbell v. City of Kenosha*, 5 Wall. 194; *The City v. Lamson*, 9 Wall. 477; *Gibbons v. Mobile & Great Northern Railroad Co.*, 36 Ala. 410; *Stein v. Mayor and Aldermen of Mobile*, 24 Ala. 591, and cases cited in appellant's brief; also, *Ex parte Selma & Gulf R. R. Co.*, 45 Ala. 696.

And these bonds, thus issued under said act, are not such claims against the county of Limestone as are required to be presented for allowance, as prescribed by the Revised Code, within twelve months after the time they accrue or become payable, else they become barred.—Revised Code, §§ 907, 909. These bonds are not such claims as those referred to in the sections of the Revised Code above cited.

Commissioners Court of Limestone County v. John D. Rather et al.

The act authorizing their issuance renders it wholly unnecessary that they should be audited and allowed by the court of county commissioners, and they are not required to be registered as claims of a different character, nor are they to be paid by warrants on the county treasury, drawn by the judge of probate, but altogether in a different way.—Pamph. Acts 1855–56, p. 281, No. 299, § 8; Pamph. Acts 1857–58, p. 331, No. 329, §§ 1, 2, 3, 4; *Dale County v. Gunter*, 46 Ala. 118.

I will now proceed to discuss the question of the remedy which has been pursued in this case, and in this connection it will be necessary to notice so much of the statute authorizing the issue of the bonds as shows the duty devolved on the court of county commissioners by that act. These duties are imposed by sections 1, 3, 4, 5, 8, 19 and 20 of the act of December 14, 1855.

Under the provisions of this act the county of Limestone subscribed for stock in the said Tennessee and Alabama Central Railroad Company, and issued its bonds to pay for the same, to the amount of two hundred thousand dollars. This appears to have been done before the 8th day of February, 1858, because on that day an act of the general assembly of this State, entitled “An act to authorize the sale of the bonds of the county of Limestone,” was approved, and became a law. These bonds are referred to in said last named act as having been already “issued by the court of county commissioners of said county in aid of the Tennessee and Alabama Central Railroad Company,” under the act first above quoted.—Pamphlet Acts 1857–58, page 331, No. 329.

It is now the fixed and well settled law of this country, that the law in force at the time a contract is entered into, becomes a part of it, both as to its stipulations and also as to the remedy, which may be resorted to to carry the stipulations into effect. And neither the law governing the stipulations nor the remedy can be so altered after the execution of the contract as to impair any rights, whether of remedy or otherwise, which grew out of the contract on the day it was made. The obligation of a contract extends

Commissioners Court of Limestone County v. John D. Rather et al.

not only to the stipulations, which the parties have agreed upon, but to the rights belonging to the remedy on the day the contract bears date. The mode of enforcement, *the practice*, may be altered, but not so as to impair the rights of the parties under the contract, as they existed at the date of its execution.—*White v. Hart*, 13 Wall. 646; *Van Hoffman v. City of Quincy*, 4 Wall. 535, 550; *Green v. Riddle*, 8 Wheat. 92; *Ogden v. Saunders*, 12 Wheat. 231; *Mason v. Haile*, 12 Wheat. 373; *Fletcher v. Peck*, 6 Cranch, 87; *New Jersey v. Wilson*, 7 Cranch, 164; *Terrell v. Taylor*, 9 Cranch, 43; *Sturges v. Crowningshield*, 4 Wheat. 122; *Beers v. Haughton*, 9 Peters, 359; *Brown v. Kenzie*, 1 How. 319; *McCracken v. Haywood*, 2 How. 612; *Planters Bank v. Sharp*, 6 How. 327; also, *Gelpcke v. City of Dubuque*. Then, there is no such thing as a lapse of the remedy which entered into the contract for its enforcement at its execution. This lives as long as the contract itself, save in such case, as the law declares, that unless it is resorted to within a certain period, it shall not be available at all. In jurisprudence, it is mere sophistry to speak of an obligation without a remedy. *The power to enforce the obligation is its legal virtue*. When this is gone, there is nothing left upon which courts can act. New remedies may be added, and the former remedies may be left unimpaired, but where the right depends upon contract, the former remedies can not be taken away, so as to effect injuriously the contract in its stipulations or in the duration or benefits of its remedies. *White v. Hart*, 13 Wall. 646, and cases *supra*. It is certainly clear, that the object of the act of December 14th, 1855, above quoted, was three-fold: 1. To authorize the county of Limestone to subscribe for two hundred thousand dollars worth of the stock of the Tennessee and Alabama Central Railroad Company, to aid in the building of their road.—Sections 1, 2, 3, 4, and title of the Act, Pamph. Acts 1855–56, pp. 291–2. 2. To authorize the issuance of county bonds for the payment of the stock thus subscribed. Section 8, Acts, *supra*; also, Pamph. Acts 1857–58, p. 331. 3. To provide a speedy and certain means to raise the funds for the payment of said bonds as they fell due.—Sec-

Commissioners Court of Limestone County v. John D. Rather et al.

tions 10, 11, Act of 1855-56. The mode to provide for the payment of the bonds is a part of the remedy. This provision for the payment of the bonds required the court of county commissioners of Limestone county to levy a tax for this purpose, and it made it the duty of the tax collector to collect the tax thus levied, and pay it in redemption of the bonds.—Sections 5, 6, 10, Act *supra*. For the convenience of the county, the payment of the bonds was extended over the period of ten years, at a stipulated amount for each one of these years. It is no where intimated in the act, that if the bonds were not paid in the time specified, then there should be no tax levied and collected for their payment. The bonds, taken in connection with the act under which they were issued, were a charge upon the county, to be paid by a levy and collection of taxes for that purpose. This is the undertaking and promise stipulated in the act; and the court of county commissioners is the agency through which this undertaking and promise is to be performed and carried into full effect. It is true, that the court could not levy the proposed tax within less time than ten years; because a shorter time is negatived by the language and purpose of the act; and in this way it was forbidden. But it seems equally certain that they are not forbidden to do this after ten years had expired, in the event that the bonds, or any of them, remained unpaid after that time. The object of the tax was to pay the bonds, and the court was authorized and required to see that this was done. In such case, the limitation of the time, without negative words, is not essential. It is merely directory, and it may be disregarded.—2 Coke Inst. 43; Smith's Com. on Stat., p. 782, *et seq.*, § 670, *et seq.*; *Walker v. Chapman*, 22 Ala. 116; *Savage & Darrington v. Walche & Emanuel*, 26 Ala. 619; *French v. Edwards*, 13 Ala. 506; and numerous cases cited in appellant's brief. The legislative purpose that the bonds should be paid is just as evident as the purpose that they might be issued, and the authority to accomplish the latter purpose survives until its functions are fulfilled. The extension of ten years was in favor of the county, for the convenience of its people, and

not a limit on the authority of the court. The intention of the legislative body is to govern in the construction of its statutes.—*Blakeney v. Blakeney*, 6 Por. 109; *Thompson v. The State*, 20 Ala. 54; Smith's Com. on Stat. page 789, § 676; also, p. 611, § 451. Here, it seems altogether reasonable to confine the limitation of the time, not to a limitation of authority of the court of county commissioners to provide the means to pay the bonds, but to a limitation in favor of the county, that the indulgence for this purpose should extend over the period of ten years at least. If we do this, and this was evidently one of the objects of the act, then, the power to provide the means to pay did not expire until its purpose was completed; that is, until the bonds were paid or otherwise discharged. It has been held that where there is not in the law an express limitation of the power given to do a certain thing, an inference will not be made which will defeat one of the objects of the law.—*Cook v. Hamilton Co.*, 6 McL. 112; see, also, numerous cases collected in appellees' brief. But besides this, the 20th section of the act above quoted empowers the court of county commissioners to "do *all* and *other* acts and things, not inconsistent with the provisions of this act, which may be *necessary* and *proper* to give *full* effect to the *objects* and provisions of this act."—Pamph. Acts 1855–56, p. 297, § 20. It has already been shown that the objects of the act were to subscribe for the stock, issue bonds to pay for it, and to provide for the payment of the bonds. The *doing* of these *things* gives full effect to the law. And until *all* these things are done, the objects of the act are not carried into *full* effect. But all have been done, save one; that is, the payment of a certain number of the bonds which are long since due and remain unsatisfied. The power to pay the debt thus created goes along with the power to contract it, and the limitation of this power is not to be implied from the limitation that it should be paid by installments. This limitation is only a limitation in favor of the debtor, but not a limitation against the creditor. The county has had the benefit of this limitation, and ought not now to complain if it is compelled to pay the debt,

Commissioners Court of Limestone County v. John D. Rather et al.

which it is admitted it justly owes. That it is a hard debt to pay, may not be denied. This is not now a matter that can be of any weight in this tribunal. It might have been wise to have considered this before the debt was contracted. After that, it is too late to urge it as a plea of any force in a judicial tribunal.

This, it seems to me, is a sufficient answer to the objection that the tax in this case is a special tax, and that the power to levy and collect such a tax is a special authority; and if this authority is limited in the manner and time of its execution, such limitation is peremptory, and not merely directory. The *objects* of the act show that this is not its true construction. The *objects* of the act the court of county commissioners was authorized and empowered *fully to effect*; that is, to contract the debt and to pay it.

It was, then, the legal duty of the court of county commissioners to have continued to levy the tax until the bonds were paid. And when they refuse to perform such duty, *mandamus* is a proper remedy to enforce it.—*Tarver v. Commissioners Court*, 17 Ala. 527, and cases there cited; 3 Black. Com. 110; *Tapping on Mandamus*, p. 9, *et seq.*; *Ex parte Selma & Gulf Railroad*, 45 Ala. 696; see, also, *Ex parte Selma & Gulf Railroad Co.*, 46 Ala. 220; *Walkley v. City of Muscatine*, 6 Wall. 481; also, cases cited in appellees' brief.

Before closing this opinion, it is due to the able counsel on both sides of this important cause to acknowledge, that the court has been greatly aided by the candid argument at the bar, and the extended and well prepared briefs, in which the authorities are diligently and learnedly collated and discussed.

The judgment of the court below is affirmed, with costs.

STRIBLING vs. THE BANK OF KENTUCKY.

[REAL ACTION IN THE NATURE OF EJECTMENT.]

1. *Security for costs; what insufficient, but will prevent dismissal of suit* —A deposit of ten dollars with the clerk of the court, as security for the costs of a suit commenced by a plaintiff who is required to give such security, is insufficient in amount, but is not an omission or failure to give security. The plaintiff may perfect the security.
2. *A mortgage by wife of separate statutory estate; when passes no title.*—A mortgage of the separate statutory estate of a married woman, executed by herself and her husband to secure the payment of their joint promissory note, vests no title in the mortgagee which will enable him to recover the possession from a subsequent vendee of the husband and wife, with or without notice. And the consideration of such note may be shown by parol proof to have been the individual indebtedness of the husband, no inconsistent consideration being expressed in the conveyance.

APPEAL from the Circuit Court of Washington.

Trid before Hon. J. Q. SMITH.

This was a real action in the nature of ejectment brought by the appellee, described in the complaint as "the President, Directors and Company of the Bank of Kentucky," against the appellant Stribling. The writ was returnable to the fall term, 1870, of the circuit court, and at that term the case was continued by consent. At the spring term, 1871, the defendant pleaded in short by consent "the general issue, with leave to give in any special matter," and the plaintiff joined issue on the plea. Afterwards, when the cause was called for trial, the defendant moved to dismiss the suit, because the plaintiff had not given security for costs as required by law. On this motion, it was admitted that the plaintiff was a foreign corporation, chartered by, and located in the State of Kentucky; that on the issuing of the writ, plaintiff deposited ten dollars for costs, which was considered sufficient security for costs by the clerk, who

receipted for the same on the back of the complaint, as follows: "Acknowledge security for costs of this suit, — day of —, 18—. Ten dollars left for costs. J. W. Gordy." "On the day the cause was called for trial, and before issue joined, the following endorsement was written on the back of the complaint: I acknowledge myself security for cost, — day —, 18—. J. W. Gordy."

Gordy was clerk of the court at the time of the trial, as well as at the time when the summons and complaint was issued; and "no objection was made to solvency and sufficiency of this acknowledgment for future costs." The court overruled the motion, and the defendant excepted.

Both parties claimed title to the land sued for through Eugenia and George G. Skinner.

The facts of the case, as agreed on by the parties, were, in substance, as follows: In January, 1868, George Skinner and Eugenia, his wife, executed their joint promissory note to the order of John E. Curran & Co. for \$1,007, payable the 1st of December, 1868, at the Southern Bank of Alabama at Mobile. To secure the payment of this note, George G. and Eugenia, his wife, executed a mortgage to Curran & Co., conveying all the right, title and interest of said George G. and Eugenia to the lands mentioned in the complaint, and of which they were then in possession. This mortgage was duly executed, witnessed and recorded in the office of the judge of probate of Washington county, the county in which the lands were situate. The note was assigned by Curran & Co. to the plaintiff, and not being paid at maturity, was duly protested. It is not clear, from the agreed statement of facts, whether the note was assigned before or after maturity: The note not having been paid, the lands mentioned in the complaint were advertised for sale, for the satisfaction of the mortgage debt, in accordance with the power conferred in the mortgage, and bought, on the 21st of January, 1870, by Alfred Goldthwaite, and by him conveyed to the plaintiff.

Subsequently to this sale, and with notice of it, Stribling purchased the premises from said Eugenia and George, her husband, and received a conveyance from them, and under

the conveyance is in possession and claims title to the premises sued for. The plaintiff then proved possession of the land by Skinner and wife at the time of their sale to Stribling, and the value of the premises during the detention, &c. The defendant then introduced a deed from one Hill to Eugenia Skinner, conveying to her the premises in suit, which it was admitted created in her a separate statutory estate under the laws of Alabama, and then offered to prove by said George G. Skinner that the mortgage under which the plaintiff claimed was executed to secure the payment of money obtained from the mortgagees by George G. Skinner on his own account, and not for the benefit of his said wife or her separate statutory estate. The plaintiff objected to the admission of the proposed evidence, and the court sustained the objection, and defendant excepted.

This being all the evidence, the court, on the request of plaintiff, charged the jury, that if they believed the evidence, the plaintiff was entitled to recover; and the defendant excepted.

The various matters to which exception was reserved are now assigned as error.

R. & O. J. SEMMES, for appellant.

ALFRED GOLDTHWAITE, *contra*.

[No briefs reached Reporter.]

B. F. SAFFOLD, J.—The statute (Rev. Code, §§ 2802, 2804,) is imperative, that when a plaintiff, who is required to give security for the costs, commences a suit without doing so, it must be dismissed on the motion of the defendant. The bill of exceptions states, that the plaintiff deposited with the clerk of the court ten dollars for costs, which was considered by the clerk sufficient security for costs, and was receipted for on the complaint in the following words: "Acknowledge — security for costs of this suit, — day of —, 18—. Ten dollars left for costs. J. W. Gordy." In *Peavey v. Burket*, (35 Ala. 141,) it was held

Stribling v, The Bank of Kentucky.

that insufficient or defective security for costs would not authorize the dismissal of the suit, without leave to repair the deficiency. The security given was altogether insufficient, but it was not equivalent to an omission or failure to give any. The term security, in some instances, means the personal obligation of a party, with one or more sureties, to pay money on certain contingencies, as security of the peace. In other cases, the law requiring it directs how it shall be given. But, generally, it seems that any mode which attains the end desired, will be sufficient. There is no doubt that a bond for costs of adequate amount would be a valid security. Ordinance 35 of the convention of 1867 authorizes pledges of property to be given instead of personal securities, in judicial proceedings. There was no error in allowing the plaintiff to give a proper security for the costs.

The land sought to be recovered from the defendant was admitted to have been the separate statutory estate of Mrs. Skinner. The note signed by herself and her husband imposed no liability on her personally, or on her estate. Neither did the mortgage of her land, given to secure its payment. There can be no mortgage where there is no debt.—*Martin v. Molton*, 43 Ala. 561; *Bibb v. Pope*, *ib.* 190; Const., Art. 14, § 6. The defendant purchased the property from her and her husband in proper compliance with section 2373 of the Revised Code, and of course obtained all the interest they could convey. This sale was a repudiation by them of the mortgage. The plaintiff, claiming title from the same source, could not defeat the defendant's valid deed with his void mortgage.

The testimony of Skinner was improperly excluded. The consideration of the mortgage was the joint promissory note of Skinner and his wife. It was not a contradiction or varying of the mortgage to prove that the consideration of the note was the individual indebtedness of the husband. A party may prove some other consideration besides that expressed in the deed, provided it is consistent with the consideration expressed.—2 Phil. Ev. 353;

Mixon v. Dunklin et al.

Peacock v. Monk, 1 Vesey, 128; *West c. Hendricks*, 28 Ala. 226; *Kinnebrew v. Kinnebrew*, 35 Ala. 628.

The judgment is reversed, and the cause remanded.

MIXON *vs.* DUNKLIN ET AL.

[BILL IN EQUITY BY JUDGMENT CREDITOR TO SUBJECT PROPERTY HELD IN TRUST FOR DEBTOR.]

1. *Creditor's bill under section 3442 of Revised Code; when without equity.*—A bill filed under the provisions of section 3442 of the Revised Code, by a judgment creditor whose execution is not satisfied, to subject to its payment property held in trust for his debtor, is wanting in equity unless it alleges a return of “no property” or a partial satisfaction only.
2. *Same; what facts do not dispense with necessity of averment of return of “no property” on execution.*—The fact that the judgment creditor was prevented from having execution at law upon his judgment, by certain military orders issued by the officer in command in this State, under the acts of congress commonly known as the reconstruction acts, does not dispense with the necessity for a return of “no property,” so as to entitle the creditor to maintain a bill under section 3442.

APPEAL from the Chancery Court of Dallas.

Tried before Hon. CHAS. TURNER.

The opinion states the facts.

FELLOWS & JOHNS, for appellant.

BROOKS, HARALSON & ROY, *contra*.

B. F. SAFFOLD, J.—The appellant filed his bill on the 11th of March, 1868, to subject to the payment of his judgment recovered against the appellee, Mrs. Dunklin, on the 21st of May, 1867, certain lands in her possession. He alleged, as a ground of chancery jurisdiction, that she and Sullivan, who claimed some interest in the property, mortgaged it, about the 7th day of May, 1867, to Smith and

Roberts, to secure the payment of a debt, which had been since paid, except a small balance; that an execution had issued on the judgment, and "the said judgment and execution remain wholly unsatisfied and unreversed, and of full force;" that certain personal property was embraced in the mortgage, and the mortgagees had advertised the land for sale, but not the personal property; that because of certain military orders in force he could not have execution at law of his judgment. He claimed that the mortgaged property was held in trust by the mortgagees for Mrs. Dunklin, and was subject to the payment of his debt in equity. He offered to pay any balance that was due on the mortgage, and prayed for general relief. The bill was subsequently amended, by making the assignee in bankruptcy of Mrs. Dunklin a party defendant in her stead. It was dismissed for want of equity.

The equity of redemption remaining in Mrs. Dunklin was subject to the execution of the complainant.—Revised Code, § 2871, par. 3. The mortgage was some embarrassment to him, as he had no legal way of ascertaining the precise amount still due upon it. The enlargement by statute of the jurisdiction of courts of law, without prohibitory or restrictive words, does not affect the original jurisdiction of courts of equity.—*Waldron v. Simmons*, 28 Ala. 629; Shep. Dig. 289, § 28. The extension of the execution to property or interests in property heretofore only accessible through equity is virtually an enlargement of the jurisdiction of the court from which it issues.

There are three prominent instances in which a creditor is entitled to the assistance of a court of chancery to obtain satisfaction of his debt. 1st. When, with or without a lien, he seeks to set aside a conveyance made to hinder, delay or defraud creditors.—Revised Code, §§ 1865, 3446. 2d. When an execution has been issued, and is not satisfied, and he wishes to compel the discovery of any property belonging to the debtor, or held in trust for him.—Revised Code, § 3442. 3d. When he may redeem.—Rev. Code, § 2513.

The first is not applicable to this case, because there is

no allegation of fraud, hindrance or delay in the intention of the mortgage. But the second embraces it, if the complainant has complied with its conditions, and includes every right he may have under the third, according to the statements of his bill. Section 3442 of the Revised Code does not require the creditor to have a lien. It supposes that there is nothing upon which a lien can rest. There must be a judgment upon which an execution has issued, and is not satisfied. The best evidence of these facts is the record. The plaintiff can not otherwise prove that his execution was issued and is unsatisfied, than by the production of the execution, with the sheriff's return thereon, for when made in pursuance of law, it becomes matter of record.—*Hardy v. Gascoigne*, 6 Por. 447. The complainant does not claim that his execution is unsatisfied because there was nothing upon which it could be levied. He says that on account of certain military orders he could not have execution at law of his judgment. Those orders were intended to apply equally to decrees in chancery, because their purpose was to prevent the sale of property under any process at the time and under the circumstances. But such an obstacle as that is not within the contemplation of section 3442.

For aught that appears in the bill, the military orders may have been the only difficulty the complainant encountered in satisfying his execution. The remedy in chancery was certainly not intended to apply to a case in which the plaintiff refused to have his execution enforced. The effect of the decisions in *Nix v. Winter*, (35 Ala. 309,) a case under section 3442, *Pharis v. Leachman*, (20 Ala. 662,) and *Brown & Dimmock v. Bates*, (10 Ala. 432,) is that proof of visible property of the defendant in the county to which the execution issued, out of which it might have been satisfied, if the complainant had exercised due diligence to ascertain the fact, would defeat the action. The averments of the complainant's bill must, under the general rule of pleading, necessarily be such as is inconsistent with this state of facts. As the statute requires the execution to be

Florence v. Paschal, Adm'r.

unsatisfied, and the best evidence of that is the return of the sheriff, it is necessary that a return of "no property," or partial satisfaction, should be alleged and proved.

The decree is affirmed.

FLORENCE *vs.* PASCHAL, ADM'R.

[APPEAL FROM ORDER DISSOLVING INJUNCTION.]

Notice of motion to dissolve injunction; what insufficient.—Notice to complainants that application will be made to the chancellor in vacation to dissolve an injunction "at Lafayette, in Chambers county, Ala., or at such place as said chancellor may be required to be by law," is void for uncertainty.

APPEAL from the Chancery Court of Russell.

Heard before Hon. B. B. McCRAW.

The facts are sufficiently stated in the opinion.

J. L. PUGH, for appellant.

HOOPER, *contra*.

B. F. SAFFOLD, J.—The only question of error submitted in this case is the interlocutory order, in vacation, dissolving the injunction, made on the 24th of October, 1871. The complainants were notified that, ten days after the service of the notice, the defendants would make application for a dissolution of the injunction "to the chancellor at Lafayette, Chambers county, Ala., or at such place as said chancellor may be required to be by law at the date of the expiration of said ten days."

The statute requires ten days notice of the application to be given to the complainant or his solicitor.—Rev. Code, § 3438. Of course, the time and place when the application will be made must be stated in the notice. This stat-

Alabama and Florida R. R. Co. v. Waller, Adm'r.

ute provides for a migratory court barely within the verge of legislative discretion, and must be strictly construed.

There can be no doubt that the notice is void for uncertainty. The time designated might have been the same for which some court of the chancellor was appointed. But whether the law required him to be there or not would depend on many contingencies. If he had been summoned elsewhere as a witness in certain cases, or if he or some member of his family had been sick, the law would have excused his attendance on his court. The complainants could not have been required to seek him at Lafayette, because he was not expected to be there, if there was any necessity for him to be any where else.—*State v. Allen*, 33 Ala. 422.

The decree is reversed, and the cause remanded.

ALABAMA & FLORIDA R. R. CO. vs. WALLER, ADM'R.

[ACTION AGAINST RAILROAD COMPANY, BY ADMINISTRATOR OF INTESTATE TO RECOVER DAMAGES FOR KILLING OF INTESTATE.]

1. *Complaint; what sufficient averment of negligence.*—In an action of damages against a railroad company, by an administrator, for injuries causing the death of his intestate, an averment in the complaint that the intestate received the injuries from which he died by a collision of the defendant's trains, through the carelessness of its engineer in charge of one of them, is not subject to demurrer for an insufficient statement of facts.
2. *Action to recover damages for killing intestate; what need not be alleged.*—It is not necessary to aver that the intestate left a widow, child, or next of kin.
3. *Common employer; when not liable for injuries to servant occasioned by neglect of fellow-servant.*—A common employer is not liable to his servant for injuries done to him through the negligence of his fellow-servant in the pursuit of their common business, without fault on his part.
4. *Same.*—He is liable, when the offending servant is incompetent in skill or prudence, within his knowledge, or his reasonable means of ascertainment.

Alabama and Florida R. R. Co. v. Waller, Adm'r.

5. *Care required in selection of employes, &c.*—Ordinary care and diligence in the selection and supervision of servants or employes is not sufficient. There must be due or reasonable care and diligence proportionable to the hazard of the business.
6. *Fitness of servant; what plea as to, demurrable.*—The defendant's supposition of the fitness of the engineer, as a reason for retaining him, is, as a plea to the action, subject to demurrer.

APPEAL from the City Court of Montgomery.
Tried before Hon. JOHN D. CUNNINGHAM.

The facts are sufficiently stated in the opinion.

RICE & SEMPLE, and COCKE, for appellant.

WALKER, MURPHEY & WINTER, and ARRINGTON & GRAHAM, *contra*.

B. F. SAFFOLD, J.—The case is a suit for damages against the appellant, by the appellee, for injuries causing the death of his intestate, under sections 2297 and 2300 of the Revised Code. There is no bill of exceptions, and the errors assigned relate to the pleadings exclusively.

The complaint charges, in substance, respecting the issues made, in the first count, that James Dixon, the intestate, came to his death by a collision of two freight trains belonging to the defendant, in consequence of the wrongful act and culpable negligence of the engineer in charge of one of them. The second count differs from the first only in naming the engineer, and charging him with gross negligence. The third alleges that the defendant caused the death of Dixon through the culpable bad management and negligence of one or more of its officers and agents, to-wit, the general superintendent, the assistant superintendent, and the master mechanic, for retaining a subordinate officer and agent of the defendant, one John J. Roche, in the capacity of engineer of one of the trains which collided about the 4th of March, 1867, after it was brought to their knowledge before the collision, by means of one or two written reports, and by other means, of the recklessness, want of skill and culpable negligence of the said Roche as engineer, by whose wrongful acts and gross and culpable

negligence, the collision occurred which caused the death of Dixon. The fourth count alleges that the officer or officers whose duty it was to employ engineers, selected and employed Roche as engineer, who was not a fit or proper person for that position; that the collision which caused the death of Dixon was the result of his reckless and imprudent conduct and negligence, and it would have been avoided if the above mentioned officers had exercised due care and diligence about the selection of Roche. In each count there is an averment that the decedent could have maintained an action for the injury, if he had lived.

Several grounds of demurrer were interposed to the complaint, all of which were overruled. The substance of them is, that facts showing a cause of action are not stated; none, showing a want of due care and diligence on the part of the defendant, in the selection and retention of the agent by whose negligence the collision is averred to have occurred; the administrator of a servant or employe of the defendant can not maintain an action for the wrongful act or omission, or culpable negligence, of any officer or agent of the defendant; there is no averment that the decedent left surviving him either widow, child, or next of kin; or that he was lawfully on any train of the defendant, or in any position that gave him a right of action.

The complaint no where states that the decedent was in the service of the defendant, or that he was on any train. For aught that appears, so far, he might have been a passenger, or a mere looker-on, or about the train on his own business, without connection with the defendant. As to a proper statement of facts, the collision itself, and the consequent death of Dixon, were facts sufficient to create a presumption of negligence for which the defendant was responsible, under the complaint. The failure of next of kin is a very *remote* possibility, as even the disability of alienage is removed by treaty with most of the nations from which we receive our immigrant population. Construing the terms of the statute alone, there is much reason for an averment of the nearest of kin. But the de-

fendant would object to the inquiry at his expense. The demurrers were properly overruled.

Two special pleas present the defense that the decedent received the injuries from which he died, in the course of his business as a fireman in the employment of the defendant on a train which collided with one of which Roche was the engineer, through the alleged negligence of the latter, who was his fellow-servant or employe; that the defendant exercised ordinary care and diligence to secure a prudent and skillful servant in the employment of Roche, who was reputed to be a careful and skillful engineer at the time, and supposed him to be such up to the time of the collision. A demurrer to these pleas was sustained.

The question of the sufficiency of the pleas is embarrassed, not so much by an uncertainty of the law, as by the difficulty of using apt expressions of discrimination. A common employer is not liable to his servant for injuries done to him by his fellow-servant in the pursuit of their common business, without fault on his part. Such fault does not exist when the tortious act is of a casual character, not inconsistent with the general competence and prudence of the offender, which the employer could not guard against by the exercise of reasonable care and diligence. His obligation to his servants does not embrace the personal undertaking for security which he promises expressly or impliedly to third persons. The servants seek their respective interests in pursuing the common business, and that nothing may abate their vigilance, they sustain their respective risks. The employer is, however, in fault when the offending servant is incompetent in skill or prudence, within his knowledge or his reasonable means of ascertaining.

As the proposition is not to charge the employer with the fault of his servant, but with his own neglect of duty, why should a less stringent rule prevail than is applicable against him in favor of third persons, as to the degree of care and diligence he must exercise in the selection and retention of his servants or agents? In so hazardous a business as that of the railroad, ordinary care and diligence in the selection and supervision of employes and agents

would not suffice against third persons, and should not against the employes. Our own authorities, *M. & O. R. R. Co. v. Thomas*, (42 Ala. 715,) require due care and diligence, which is a higher degree than is expressed by the term "ordinary," and is, perhaps, sufficiently definite and expressive. The meaning of such terms will vary in application according to the hazard of the business and the sentiment of the people.

Another objection to the pleas is, that the defendant's supposition of the fitness of the engineer, Roche, is alleged as a sufficient reason for retaining him. Suppose means no more than belief, if as much, and the latter would be wholly inadmissible, as a defense to the action, if unreasonable. A fourth plea is referred to in the judgment entry as having been rejected on demurrer, but it is not found in the transcript.

The judgment is affirmed.

WARNOCK ET AL. vs. THOMAS ET AL.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Revised Code*, § 2221; *what allegation equivalent to the word "equitably" used therein.*—An allegation in a petition to the probate court for an order to sell the land of a decedent under section 2221 of Revised Code, that the same can not be "fairly" divided, &c., is equivalent to saying that it can not be "equitably" done.
2. *Decree; for what reason, not void.*—A decree for the sale of the land of a decedent, and of confirmation of such sale, are not void because rendered by a probate court of the late insurrectionary State government.
3. *Ejectment by heir; what sufficient defense to.*—To an action of ejectment brought by the heirs or devisees of a decedent to recover real estate of which he died seized and possessed, it is a sufficient defense that the lands were sold under a valid decree of the probate court, the sale confirmed, the purchase-money paid, and a deed executed to the purchaser.

APPEAL from the Circuit Court of Bullock.

Tried before Hon. J. McCaleb Wiley.

The facts are sufficiently stated in the opinion.

STONE & CLOPTON, for appellants.

J. N. ARRINGTON, and WATTS & TROY, *contra*.

B. F. SAFFOLD, J.—The appellees were the plaintiffs in the suit in the nature of ejectment, and claimed title to the lands sought to be recovered through Martin H. Day. The defendants deduced their title from the same source. They admitted that the plaintiffs were the heirs or devisees of the said Day, but they defended on the ground that they had purchased the lands at a valid sale made by the administrator of Day's estate under a decree of the probate court, and that the sale had been confirmed by the court, and a proper conveyance made to them by the administrator, under its order. The validity of the sale is the matter to be determined.

Martin L. Day died in November, 1860. His will was admitted to probate on the 12th of December afterwards. Amanda M. Day, his widow, and Eli M. Ford became his administrators with the will annexed on the 1st of January, 1861. On the 10th of July, 1863, they represented to the probate court, by petition in writing, but not sworn to, that "there is now belonging to said decedent" certain lands, and "that said land can not be fairly divided among the heirs-at-law of said decedent without a sale of the same;" "that the following named persons are the heirs of said decedent, entitled to share in the distribution of said estate," &c., among whom are some minors. And they prayed for an order of sale. The depositions of two witnesses were taken to show the necessity of a sale, and they testified that the lands could not be fairly and equitably divided among the heirs without a sale, not showing any other necessity. The order of sale was granted on the 7th of September, 1863. The sale was made, reported to the court, and confirmed. Afterwards, on the 28th of March, 1865,

the payment of the purchase-money having been reported, the court ordered the administrator to convey the lands to the purchasers, which was accordingly done by deed on the 27th of April, 1868. The defendants were the purchasers.

The court, at the request of the plaintiff, charged the jury, that if they believed the evidence they must find for the plaintiff, and the defendants excepted, &c.; and this, and the refusal to give charges requested by the defendant, are now assigned as error. The charge given, and the charges refused to be given, all turn upon the validity of the sale, as set forth in the evidence.

In *Satcher v. Satcher*, (41 Ala. 26,) the most simple, comprehensive and satisfactory of all the decisions in this State on the vexed question of what is essential to the validity of a sale of land under a decree of the probate court, it was declared that the jurisdiction of the court attaches on the filing of a petition, stating therein a statutory ground for the order of sale, and when this is done the order is not void, though the proceedings may abound in errors. And further, that when there are minors or persons of unsound mind interested in the estate, proof by deposition, as in chancery cases, shall be taken showing the necessity of such sale.

Lands of an estate may be sold by order of the probate court having jurisdiction of the estate, when the same can not be equitably divided amongst the heirs and devisees. Rev. Code, § 2221. In this instance, the jurisdictional allegation is, that the lands can not be "fairly" divided, &c. An allegation of import equivalent to that required by the statute, will support the jurisdiction, and in determining this, that legitimate signification of the words used favoring the validity of the order will be applied to them.—*King v. Kent*, 29 Ala. 542; *Satcher v. Satcher*, *supra*. "Fairly" means equitably, and when used to represent a division of lands, is too nearly its synonym for practical distinction. Webster's Dictionary; Worcester. The record recites that proof showing a necessity for a sale was taken by deposition, as in chancery cases, and nothing appears in contradiction. The only necessity to be shown, under section

2225 of the Revised Code, is that the land can not be equitably divided.

The objection, that the decrees of sale and confirmation were rendered by a court of the late insurrectionary State government, is not available.—*Griffin v. Ryland*, 45 Ala. Rep. 688.

The judgment is reversed, and the cause remanded.

RODGERS ET AL. *vs.* ABERCROMBIE ET AL., ADM'RS.

[MOTION TO DISMISS APPEAL.]

1. *Appeal to supreme court; to what term returnable.*—An appeal to the supreme court should be made returnable to the next ensuing term of said court, after the appeal is perfected by the giving of security for costs of the appeal as required by the statute.
2. *Same; when will be dismissed.*—An appeal taken during the session of the court after the commencement of the term, which is made returnable to the then pending term, will be dismissed on motion of appellees.

This was a motion to dismiss the appeal in this case. The motion was made at the January term, 1872, the transcript in the cause having been filed on the 24th day of January. The opinion seems to have been delivered at the January term, 1872, although it is marked June term, 1872.

W. H. BARNES, for motion.

———, *contra*.

PETERS, J.—The appellants move the court to dismiss the appeal in this case, because the record shows that the appeal was taken on the 12th day of January, 1872, and made returnable to the present term of the court, instead of the next ensuing term after the allowance of the appeal.

The right to an appeal is absolute, and it may be taken at any time within two years from the rendition of the

judgment or decree from which the appeal is taken.—Rev. Code, §§ 3485, 3508. And this right may be exercised on any day of the whole period of two years, within which an appeal is not barred by the statute of limitations, except, perhaps, on Sunday. When the appeal is demanded and security for the costs is given, as required by law, then the right of the appellant is perfected.—Rev. Code, §§ 3509, 3492. When the appeal is taken before the term of the court, in vacation, and the citation is not executed on the appellee ten days before the commencement of the court, the cause will not stand for trial until the next succeeding term.—Rev. Code, § 3498. But there is no express statute specifically directing to what term an appeal shall be taken, or forbidding that it shall be taken to a pending term. Yet the section of the Code directing how the transcript of the record shall be prepared and sent to the clerk of this court, requires that it shall be made and delivered to the appellant or his attorney, “in time to be returned to the next term of the supreme court.”—Rev. Code, § 3492. Besides, the citation and notice of appeal is required to be “made returnable to the next term of the supreme court.”—Rev. Code, § 3488. These directions, which are peremptory, would be nugatory and useless, unless we construe the legislative meaning to be, that the appeal also is to be made returnable to the next ensuing term of the supreme court after it is granted and security for costs is given and approved, as required by law.—*Willingham v. Harrell*, 34 Ala. 680. I confess that I yield with a very great reluctance to this conclusion, but the logic of fair interpretation compels it. It is the opprobrium of justice, that any cause should be dismissed from court without a trial upon its merits. But as courts do not make law, but only administer it, such results are sometimes unavoidable. Governed by these views, the motion of appellees must be allowed.

Let the appeal be dismissed out of this court.

WALLER, ADM'R DE BONIS NON, vs. RAY, FARLEY ET AL.

[APPEAL FROM DECREE OF PROBATE COURT ON FINAL SETTLEMENT OF ACCOUNTS OF ADMINISTRATOR DE BONIS NON, &C.]

1. *Administrator; what settlement by, final and not liable to collateral impeachment.*—When an executor or administrator resigns, and makes the settlement required by section 2232 of Revised Code, such settlement is to be regarded as the final settlement of the out-going executor or administrator, and it can not be collaterally impeached, in the subsequent administration of the estate.
2. *Same; duty of probate court in such settlement.*—On such settlement, it is the duty of the court to examine and audit the account of the out-going executor or administrator, and to require him to produce satisfactory evidence of the correctness of each item on the credit side of the account, whether exceptions be or be not filed to the same.
3. *Same; who are proper parties on such settlement.*—The parties to such a settlement are the heirs-at-law of the deceased, and the legatees or distributees, as the case may be, the administrator *de bonis non* of the testator or intestate, and, if the estate has been declared insolvent, the creditors are also proper parties.
4. *Administrator de bonis non; when not chargeable with items improperly allowed, &c., on final settlement of administrator in chief.*—Where the administrator *de bonis non* appears on such settlement, and examines the accounts, and, without filing exceptions, consents that the same may be allowed, this is not sufficient, on any subsequent settlement, to charge him with negligence, unless it clearly appears that said account, or items in it, were improper and should have been disallowed, and that he omitted to file exceptions from motives of bad faith.
5. *Executor; when entitled to compensation outside of commissions on receipts and disbursements.*—Where the will requires the widow, as executrix, to keep the estate together, and “to work it,” as though the testator were alive, she is entitled to reasonable compensation for doing so, independent of commissions for receipts and disbursements. Although such compensation may not, strictly speaking, be a preferred claim, yet it is to be paid before the ordinary debts of the testator, in case of insolvency.
6. *Exceptions to accounts of administrator of insolvent estate; when must be filed, &c.*—Where the administrator of an insolvent estate files his accounts for a distribution among the creditors, no exceptions can then be made that might have been made at any previous settlement, or when the estate was declared insolvent.
7. *Revised Code, section 2706 of; to what cases does not apply.*—Where an executrix was authorized by the will of the testator “to work the place” as

Waller, Adm'r de bonis non, v. Ray, Farley et al.

if the testator were alive, and invested with a large discretion as to the management and conduct of the estate, she will not be liable, notwithstanding section 2706 of the Revised Code, to account for rent of lands for which she took no other security than the note of the lessees, who were then reputed solvent, but afterwards became insolvent, whereby she failed to collect the rent.

APPEAL from the Probate Court of Montgomery.

Tried before Hon. GEORGE ELY.

The facts are sufficiently stated in the opinion.

WATTS & TROY, for appellant.

STONE, CLOPTON & CLANTON, ELMORE & GUNTER, MARTIN & SAYRE, and FITZPATRICK & WILLIAMSON, *contra*.

PECK, C. J.—On the 31st day of January, 1864, William H. Rives, late of Montgomery county, made and published his last will and testament, by which he appointed his wife, Sarah J. Rives, executrix, and his friends, James Porter and Thomas H. Watts, executors, and shortly thereafter departed this life.

The said Porter and Watts declining to act as executors, Mrs. Rives, on the 7th day of March of said year 1864, had the said will proved in the probate court of said county, and qualified as sole executrix of the same. She gave no bond and security as executrix, the said will directing that none should be required.

The testator, at the time of his death, was possessed of a large estate, estimated to be worth over \$200,000, consisting of two large plantations and ninety-odd thousand dollars worth of negro slaves, and other personal property, then usually owned by such persons, and in addition to his other business, was extensively engaged in the manufacturing of salt, in Clark county, in partnership with a Mr. Figh.

The said will directed his estate to be kept together and worked, as though he were alive; that his wife and four infant children should live together as one family, and be supported and maintained out of the proceeds of his property, so long as his wife remained a widow, and that the

Waller, Adm'r de bonis non, v. Ray, Farley et al.

children should be under her guardianship, and properly educated, and the expenses paid out of his estate.

The will gave the executrix and executors, or such of them as should qualify, full power to sell, at their discretion, any of his property at private or public sale, whenever they should think necessary, and to sell and buy without any order of any court, for the benefit of his estate or children; and enjoined upon them not to demand specie from any of his debtors, but to receive current funds, the common currency of the country.

Mrs. Rives, as executrix, continued to administer said estate, under the will, until the early part of the year 1867, when she resigned, and on the 4th day of March of said year, filed her accounts and vouchers in the probate court of said county for a final settlement.

After the resignation of Mrs. Rives as aforesaid, appellant was appointed administrator *de bonis non*, with the will annexed. On the 13th day of April, 1867, said settlement was made, the decree of the court showing that due notice had been given, and that John H. Campbell had been appointed guardian *ad litem* for the infant heirs-at-law of testator, and appeared in open court and proceeded to contest said settlement; the decree also showing, that appellant appeared and examined said accounts and vouchers, and consented that they might be passed and allowed.

The decree then states, that the court proceeded to hear all objections to said accounts, and to consider the evidence upon all matters touching the correctness and legality of said accounts, and, thereupon, rendered a final decree, by which said accounts so filed were allowed. One of the items on the credit side of said accounts was the sum of \$3,650 allowed to said executrix as commissions. The court also decreed that said executrix recover of appellant as administrator *de bonis non, &c.*, the sum of \$6,722 03, the balance found to be due to her on said settlement, by said estate, "*on account of her administration.*"

The record shows that after this settlement, to-wit, on the — day of —, 1867, said appellant, as administrator *de bonis non, &c.*, reported said estate insolvent, and that the

same was duly declared insolvent by a decree of said probate court, and that afterwards he made a settlement of his administration, and the creditors failing to elect an administrator, said appellant was continued in office, as administrator in insolvency.

The record further shows, that after said estate was declared insolvent, to-wit, on the 31st of December, 1869, appellant, as administrator, &c., as aforesaid, paid to Mrs. Rives the said sum of \$6,722 03, so decreed to her as aforesaid. After this, to-wit, on the 20th day of July, 1870, the claims filed against said estate by the creditors were, at the instance of the creditors and of said appellant, audited and allowed by said probate court, among which was the said sum of \$6,722 03, decreed to Mrs. Rives. After this, the record shows that appellant filed his accounts for a settlement and partial distribution, &c., among the creditors, whose claims had been audited and allowed; that due notice having been given to the creditors, the said settlement was had on the 6th day of October, 1870.

On this settlement, the appellees, William C. Ray, James A. Farley, and Abram Martin, and others, creditors, who had filed claims against said estate, appeared and filed exceptions to appellant's accounts, &c. These exceptions are based, mainly, upon the alleged negligence and failure of appellant, as administrator *de bonis non*, &c., to use due diligence in having a proper settlement made by Mrs. Rives as executrix, &c., by reason whereof, as stated, improper credits were allowed to her on said settlement, to the prejudice and injury of said estate, for which he was sought to be charged, &c.

On the hearing of said exceptions, after the evidence of both parties was closed, all of which is set out in appellant's bill of exceptions, the court by its decree struck out of appellant's account sundry items, amounting in the aggregate to the sum of \$5,907 22, and charged him with the same. The court also charged him with another sum of \$2,338 74, which, it is stated, was lost to said estate, by the alleged negligence of appellant on the settlement of said executrix, and also with the following sums, to-wit: \$1,200,

Waller, Adm'r de bonis non, v. Ray, Farley et al.

the amount of what is called the note of Bulger, Bancroft & Co., which it was insisted the said executrix should have been charged with, but that appellant made no effort to have this done; \$1,200, paid by executrix to W. W. Allen, and \$1,900, paid by her to Lilly & Porter. The court also struck out, and disallowed altogether, the said sum of \$6,722 03, decreed to executrix on her settlement, "on account of her administration."

To these several rulings, and to the decree of the court, appellant excepted, and appeals to this court to have the same reviewed.

A settlement made under section 2232 of the Revised Code, by an executor or administrator who has resigned, is, as to such executor or administrator, a final settlement, (Rev. Code, § 2165,) and is conclusive between the parties to such settlement, and can not be collaterally impeached in the subsequent administration of the estate.—*Griffin v. Griffin*, 40 Ala. 296; *Modawell v. Holmes*, *ib.* 391; *Slatter v. Glover*, 14 Ala. R. 648; *Watson v. Huttle*, 27 Ala. R. 513. Such executor or administrator must, within one month after his resignation, file his account and vouchers, &c., as in other cases of final settlement.—Revised Code, § 2232, *supra*. The parties to such settlement, where the estate has not been declared insolvent, are the heirs and legatees, or the heirs and distributees, as the case may be, and the administrator *de bonis non* of said testator or intestate.—Rev. Code, § 2166. If the estate has been declared insolvent, then, we think, the creditors should also be made parties, although there seems to be nothing in the Revised Code directing who are to be the parties in such a case.

When the accounts and vouchers are filed, the same notice must be given by the court as in other cases of final settlements.

On such settlement, it is the duty of the court to examine and audit the account, (Rev. Code, § 2143,) and on such auditing, the resigned executor or administrator must produce satisfactory evidence of the correctness of each item on the credit side of his account, and this, whether any objections be or be not made.—Rev. Code, § 2144.

Any person interested may appear and contest any item of the account, and may examine the executor or administrator, or any witness, in relation thereto.—Revised Code, § 2147. But I am not advised that there is any law that makes it the duty of the administrator *de bonis non* to supervise such settlement, or to make any objections to said account, or to any item contained in it. As we have seen, it is the duty of the court to require the executor or administrator to produce satisfactory evidence of its correctness. If the estate is settled as a solvent estate, the heirs and legatees or distributees are parties, and if of age, they can appear and protect their interests, or if infants, this duty devolves on their guardian *ad litem*; but if the estate is insolvent, then the creditors should be made parties, and if they neglect to see to their own interests they can with no propriety charge the administrator *de bonis non* with negligence for failing to do it for them. The duty of the administrator *de bonis non* is to receive from the out-going executor or administrator, under the decree of the court, the unadministered assets of the estate, and to administer them according to law.

It is unnecessary to undertake to decide what might be the liabilities of an administrator *de bonis non*, if from motives of bad faith he should omit to overlook the settlement of an out-going administrator, and thereby injury should result to the parties interested, as the question does not arise in this case. There is no evidence in this record that, as it appears to us, tends to show bad faith in the matter of said settlement on the part of appellant. The only evidence on this subject is what appears in the decree of the court then made. It is there stated that the appellant, as administrator *de bonis non*, &c., appeared in open court and examined said accounts, and consented that the same might be passed and allowed. This statement, fairly interpreted, means that appellant examined said accounts, and discovering no ground for exceptions, consented that, as far as he was concerned, they might be allowed. In the absence of evidence to the contrary, it should be presumed this exam-

Waller, Adm'r de bonis non, v. Ray, Farley et al.

ination was honestly made, and that exceptions would have been filed if appellant had believed any good reasons existed for doing so. But the decree of the court shows that said accounts were not allowed because no exceptions were filed by appellant; on the contrary, it appears the guardian *ad litem* of the minor heirs did contest said settlement; that evidence was introduced; that the court heard the objections and considered the evidence, and that the decree was based, not upon appellant's consent, but upon the correctness of said accounts, as shown by the evidence. This disposes of the question of negligence, and substantially disposes of the whole case.

The settlement, thus made by the executrix, was a final settlement of her administration of said estate under said will, and the decree then rendered must be regarded, as to the parties before the court, as final and conclusive as to all matters then in issue; conclusive that her accounts were correct; that the commissions allowed her were properly allowed, and that the decree for \$6,722 03 rendered in her favor, against the appellant, as administrator *de bonis non*, was the sum justly due her "*on account of her administration.*" This decree must be presumed to have been rendered on sufficient evidence, and on any future settlement of the administrator *de bonis non* can not be collaterally impeached, either by him or by any other person, to his prejudice.

If it be conceded, that the appellees and creditors were not parties to said settlement, because the estate had not then been declared insolvent, and, therefore, should not be bound by said decree, they will gain nothing in this case by said concession; if not conclusive as to them, it must be held to be presumptively correct, even as to them, and if, when an opportunity was offered, they failed to make objection, they must be considered as admitting its correctness. After said settlement was made, the record shows that appellant, as administrator *de bonis non*, reported said estate insolvent, and that afterwards, on the — day of —, 1867, said estate was duly declared insolvent by a decree of the court, and after said decree of insolvency, said ap-

pellant made a settlement as administrator *de bonis non*. To each of these proceedings the appellees, as creditors, were parties, and as they made no objection to the said settlement of the executrix, Mrs. Rives, or to the decree then rendered, or to the correctness of any of the items contained in the accounts filed by her and allowed by the court, common justice and equity require that, thereby, they should be held to have waived the right to object to said settlement and decree, in the future administration of said estate as an insolvent estate. But I think the appellant may safely go further, and rest the case on the presumption in favor of the correctness of the said settlement of the executrix, and on the evidence introduced on the hearing of appellees' said exceptions. That evidence shows that the items excepted to, consist of debts which the testator owed at the time of his death, and which had been paid by executrix, two sums paid by executrix to agents employed by her in the management of said estate, \$500 to Chamberlain, and \$2,000 to Porter, expenses paid for the maintainance and education of testator's minor children; the commissions allowed to executrix, the decree of \$6,722 03 in her favor, and due to her "on account of her administration," and \$1,200, the note of Bulger, Bancroft & Co., given to executrix for the rent of the Loftin plantation for the year 1866, and payable on the 1st day of January, 1867,—all these items were allowed to executrix on her settlement.

The presumption that these items were properly allowed, is not destroyed, but rather confirmed, by the evidence before the court on the hearing of appellees' exceptions. The estate, as settled by executrix, was settled as a solvent estate, and, therefore, she was entitled to be credited with the debts of testator paid by her. Such were the items paid to Allen, and to Lilly and Porter. The witness Porter proves the payment of the \$500 to Chamberlain, and the \$2,000 to Porter, as agents of executrix, employed to aid her in the management of said estate. He also proves the necessity for their employment, and that the said sums paid were reasonable. As to the \$3,650 allowed to execu-

Waller, Adm'r de bonis non, v. Ray, Farley et al.

trix as commissions, it is only necessary to look at the accounts filed by her, to see that the sum does not exceed the commissions authorized by section 2116 of the Revised Code on receipts and disbursements. As to the sum of \$6,722 03 allowed to executrix "on account of her administration," the witness Watts states that he was well acquainted with said estate; knew of what it consisted, and of the trouble and responsibility in keeping it together; and managing the same, from the death of testator to the resignation of executrix in April, 1867, and that he was well acquainted with the nature and value of the services required in keeping such an estate together, and attending to its business during said period, and that in his opinion from six to eight thousand dollars would have been reasonable compensation to executrix for her services and responsibility in keeping said estate together, and managing the same for said period. As the will required the executrix to keep said estate together and "*to work it*," as though testator were alive, she was, as we think, clearly entitled to reasonable compensation for doing so, independent of ordinary commissions; and, considering the value of said estate, and the extensive and complicated character of the business of testator at the time of his death, which by the will executrix was directed to continue, and the additional trouble that must necessarily have fallen on her by the emancipation of the slaves, we are not prepared to say the sum allowed by said decree is unreasonable. This sum, although, perhaps, not strictly speaking a preferred claim, under section 2066 of the Revised Code, common equity requires its payment before the payment of the ordinary debts of testator, and for this reason we hold that said sum was properly paid by appellant, as administrator *de bonis non*, &c.

The note for \$1,200 for the rent of the Loftin plantation was properly allowed as a credit to executrix on her settlement, and therefore could not, on the evidence, be charged to appellant in the subsequent settlement of his administration, either as administrator *de bonis non* or as administrator in insolvency. The said plantation was rented to the firm of Bulger, Bancroft & Co., and the three parties

composing said firm gave their note, as individuals, for the rent, and at the time were considered responsible for said sum. Although, by section 2076 of the Revised Code, executors and administrators are, ordinarily, only permitted to rent the lands of the deceased at public auction, securing the payment of the rent by notes or bonds, with two good and sufficient securities, &c., yet this section does not apply to executors, where the will gives them the power to act generally, in the management of the estate, as they may think best. The will, in this case, gave the executrix a very large discretion, and authorized her to buy and sell as she might think best, in her discretion, both the real and personal estate; and this power, we hold, reasonably interpreted, justified her in renting the lands the same way. And besides, there was no evidence tending to show negligence on the part of executrix in failing to collect said note. The evidence shows, that before said note fell due, before the end of the year, the makers abandoned, and left nothing out of which the note could be collected. The only remaining item to be considered is the moneys expended by executrix in the education and maintainance of testator's infant children.

The will expressly charged the executrix with the education and support of the children, and directed the expenses to be borne by the estate; therefore, the moneys expended by executrix for these purposes, not being shown to be unreasonable, were proper credits in her accounts. After a careful examination of the whole record, we are satisfied the appellees' exceptions should have been overruled.

The judgment is reversed, and the cause remanded for further proceedings, at the costs of appellees.

ADDISON *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Defendant in criminal trial; when can not call for all of conversation testified to by State's witness.*—Where a witness for the State, on cross-examination, states that he had a conversation with the defendant, before the offense is alleged to have been committed, and also states what he, the witness, said to the defendant,—this does not entitle the defendant to have all that was said, in such conversation, disclosed by the witness as evidence in his behalf.
2. *Leading question; permitting or refusing to be asked, not revisable on error.* Leading questions rest in the sound discretion of the court, and the ruling of the court, in either permitting or refusing to permit such questions to be asked, can not be assigned for error.
3. *Witness, mode of impeaching; what charge as to, erroneous.*—Where a witness is impeached, either by calling witnesses to depose to his general bad character, or by contradicting him, as to some statement alleged to have been made by him out of court, which he denies on his examination in court,—it is an error in the court to charge the jury to *throw aside* the testimony of such witness, and not to consider it, except in so far as it may be sustained or corroborated by other testimony in the cause.
4. *Same; true rule as to impeachment of witness.*—The true rule in such cases, is not to throw aside the evidence of a witness thus impeached, but to submit all that may be said by or for him, and all that is said against him, to the jury, to give to both such weight and credit as justice, in the particular case, may seem to demand.

APPEAL from the Circuit Court of Russell.

Tried before Hon. LITTLEBERRY STRANGE.

The appellant, Jake Addison, was indicted for the murder of Wesley Joseph, found guilty of murder in the second degree, and sentenced to the penitentiary for ten years.

The prisoner and deceased resided on the same plantation in Russell county, the cabin in which the prisoner and his wife lived being not far from the house in which deceased lived. A public road ran in front of both cabins, and not far from them. Several witnesses were introduced by the State, who testified that, being aroused by the firing

and hearing voices, on the night when the killing occurred, they went in the direction of the noise, and found the deceased, with four buckshot wounds in the bowels, lying with his feet towards the prisoner, not far from the public road, and between the two cabins. The prisoner was standing close by, ramming his gun, both barrels of which had been discharged, and cursing loudly. All the State's witnesses testified that they heard the two shots fired, and one of the witnesses that he saw the prisoner when he fired the first time. Among the witnesses introduced by the State was one J. T. Smith, who testified, that on being waked by the firing, he heard a voice, which he recognized as that of the deceased, cry out "oh Lord," and heard another voice, which he recognized as that of the prisoner, say "damn you! I told you I intended to kill you;" that shortly after this he heard a second shot fired, and went to Jake Addison's house. When witness got to the house, the prisoner was standing in front of it with a double-barreled gun, ramming it and cursing. Witness could not remember what prisoner said, except that he stated "that he had been there watching for deceased, and had shot him, but did not know whether he had killed him or not." This was all witness could recollect of what prisoner had said, except that "he was cursing and damning." This witness, on cross-examination by defendant, stated that about three weeks before the killing, he had a conversation with defendant about defendant's wife, the deceased and another person; that witness told defendant "if his wife was such a woman as he stated her to be, he would quit her, and that he further told defendant he did not think he had any ground to quit her." The witness then stated that he could not recite all the conversation unless he was allowed to state what defendant said to him, but that this was all he could remember having said to defendant. Thereupon, the defendant's counsel asked the witness to state all that was said by witness and defendant on that occasion. The State objected to this question, and the court sustained the objection, and would not permit the witness to answer, and the defendant excepted.

The State examined another witness, one Burrell Henry, who testified as to the shooting and the reasons given by the defendant for shooting the deceased. He testified that defendant, among other things, told witness that he had shot deceased because he saw him come out of defendant's house; that deceased "had been there after his wife; that he shot deceased after he came out of his house, because he put his hand behind him, and to his belt." There was no proof that deceased had any weapon about him, and some of the State's witnesses testified that deceased had on no belt when he was shot.

On cross-examination by defendant's counsel, the witness Henry repeated what defendant told him at the time of the killing, and added, that defendant said he had said to deceased, "oh, if you are for a fight, I'll shoot you." Witness then stated, in answer to defendant's counsel, that this was all defendant had said. Defendant's counsel then asked witness, "did not Jake say in the same connection, and at the same time and place, that he would not have fired had not Wes. put his hand behind him?" This question was objected to on the part of the State, because it was leading. The objection was sustained, and defendant excepted.

After the evidence of the State was closed, the defendant examined "two colored witnesses, named Dennis Jackson and Wilson Dobey." After they were examined, the State introduced several witnesses, to impeach the credit of said Jackson and Dobey, who stated that they knew the general character of said Jackson and Dobey; that it was bad, and that they would not believe them on oath. The bill of exceptions recites, that "one of said impeaching witnesses said, that when it come to *that color*, he would not like to believe any of them on oath." The credibility of said Dobey was also attacked, by proving that he had made statements to one John D. Quarles, which Dobey denied on his examination.

After all the evidence was closed, the court charged the jury, in substance, as follows: That there were two modes known to the law, by which a witness could be impeached. The first, by calling witnesses to testify to the general bad

Addison v. The State.

character of the witness, and that they would not believe him on oath. That was one way; and "the jury should *throw aside* the testimony of such witness, and not consider it, except in so far as it might be sustained or corroborated by other testimony in the case. The other way was, by asking the witness sought to be impeached, while on the stand, a question material to the issue, and drawing his attention to the time, place and persons who were present, and ask him if he had said a particular thing, and if he denied having said it, by calling the impeaching witness and proving by him that he had said it; and this would have the same effect, as above explained, in the first mode of impeaching." To this part of the charge the defendant excepted.

There were other exceptions reserved to the ruling of the court below, but as they were not considered by the court, it is unnecessary to refer further to them.

HOOPER, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

PECK, C. J.—1. The court below rightfully refused to permit the defendant to call out from the State's witness, J. T. Smith, on cross-examination by defendant, all that was said by the witness and defendant at the time of the conversation about which the witness testified.

If said conversation had been called out by the State, the defendant would have been entitled to all that was said at the same time on the same subject; but as the witness had spoken of said conversation on defendant's cross-examination, he could not, thereby, make all that was said evidence in his own behalf. The rule is, if the State examines a witness as to a conversation of the defendant, then the defendant may insist upon having the whole conversation disclosed for the consideration of the jury. This is necessary, that the true meaning and import of the conversation may be rightly understood.—1 Greenl. Ev. § 201.

2. The question put to the witness Burrell Henry was clearly leading. It suggested to the witness the answer

desired. Leading questions are frequently very properly permitted to be put; yet it is a matter resting in the sound discretion of the court, and whether permitted or refused, can not be assigned for error.—1 Greenl. Ev. §§ 434-435; *Donnell v. Jones*, 13 Ala. 490; *Walker et al. v. Dunsbaugh*, 20 N. Y. Rep. 170.

3. The court, we think, clearly mistook the law, in its charge as to the mode of impeaching witnesses. I know nothing in the whole law of evidence more unsatisfactory than the two ways mentioned in the charge of impeaching the credibility of witnesses. The first rests upon the mere opinion formed of the character of a witness, by those who reside in the neighborhood, and such opinion rests, not upon any well ascertained facts, but upon what uncertain rumor or prejudice may say of the impeached witness. It is, therefore, unjust both to the party and his impeached witness, altogether, to *throw aside* the evidence of such a witness, and to discredit him, except in so far as he may be sustained and corroborated by the other evidence in the cause.

Justice to both requires that the whole evidence should be left to the consideration of the jury, to determine the force and credit to be given to the impeached and impeaching witnesses.

The other mode of impeaching a witness, by contradicting him as to an alleged statement, made out of court, which he denies on his examination in court, is liable to serious objection. Like the evidence of declarations, when offered against a party, it should be received with great caution. Such evidence is subject to much imperfection and mistake. The party whose declarations are sought to be contradicted, may not have clearly expressed his own meaning, or the witness called to contradict him may have misunderstood him, or by unintentionally adding or omitting a single word, the declaration proved becomes a very different declaration from the one really made by the party who is thus contradicted. We hold the true rule, in such cases, to be, not to *throw aside* the evidence of a witness thus impeached, but to leave all that is said by him, and

May and Wife v. Smith, Edwards & McKeithen.

against him, to the jury, to give to both such weight and credit as justice, in the particular case, may seem to demand.

For the error in the charge of the court, the judgment is reversed, and the cause is remanded for a new trial, and the defendant will remain in custody until discharged by due course of law.

MAY AND WIFE *vs.* SMITH, EDWARDS & McKEITHEN.

[ACTION AT LAW AGAINST HUSBAND AND WIFE TO SUBJECT SEPARATE STATUTORY ESTATE OF WIFE TO PAYMENT OF BILL FOR MEDICAL SERVICES RENDERED AND DRUGS FURNISHED, &c.]

1. *Separate estate of wife ; what are proper charges against, under section 2376 of Revised Code.*—Medicines, and the professional services of a physician, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, are proper charges against the separate estate of the wife under section 2376 of the Revised Code.
 2. *Same ; what not proper charge against.*—The children of the husband by a former marriage are not such members of the household or family, when residing in it, as is contemplated by that section.
 3. *Same ; what causes of action can not be joined in proceeding to subject estate of wife under section 2376 of Revised Code.*—A cause of action against the husband only, can not be joined with an action prosecuted against the husband and wife jointly, for the purpose of enforcing a liability against her separate estate for articles of comfort and support of the family.
- Quere.*—As to form of judgment in a suit against husband and wife for necessities.

APPEAL from the Circuit Court of Autauga.
Tried before Hon. LUTHER R. SMITH.

The appellees brought an action against the appellants, Hiram J. May and Martha, his wife, to recover the sum of one hundred dollars, alleged to be due by them for work

May and Wife v. Smith, Edwards & McKeithen.

and labor, &c., medical services, and drugs and medicines furnished by the appellees to the appellants during the years 1868 and 1869. The complaint alleges, in substance, the marriage of defendants in this State, their living together as husband and wife in this State, and the possession by the wife of a separate statutory estate under the laws of Alabama, (the description of which, and the manner in which said Martha became possessed thereof, being specially set forth,) before and at the accrual of the cause of action; that the amount charged for the drugs and medical services was just and reasonable; that the medical services were rendered to the said Martha and family, while they were sick and needed the same, at the request of defendants; that the drugs were furnished to said Martha and family at her husband's request. It is also alleged, that the services, drugs, &c., were articles of comfort and support of the household, and suitable to the degree and condition of the family, and for which the husband would be liable at common law.

On the trial, one of the appellants proved an account and the correctness of various items therein, for professional visits, delivering a child, prescriptions, &c., amounting in the aggregate to \$57 20. He testified, in substance, that the account was for medical services rendered by himself and the firm of physicians of which he was a member, to said Martha May and her child by said Hiram, and to two children of said H. by a former marriage and his sister, and for drugs and medicines furnished the same parties, (with the exception of May's sister,) at the request of said Hiram J. May; that the sister of said Hiram and his said children resided with said Hiram and his wife Martha during the time the services were rendered, and the drugs and medicines furnished them. Witness could not tell what proportion of the drugs and medicines furnished was for said Martha and her child, or what proportion was for the children of May's former marriage, but that the most of it was for said Martha, and the balance for the other members of the family; that the account for medical services was made up in part of charges for services rendered to the children

May and Wife v. Smith, Edwards & McKeithen.

of May by former marriage and to his sister. The witness specified all the items in the bill which were for services rendered May's sister. The witness further testified, that May's sister and the children of his former marriage were dependent on him for support. There was proof introduced as to the reasonableness of the charges in the account, and the possession and title of the defendant Martha to the separate statutory estate as averred in the complaint.

This being the substance of all the testimony, the court, at the request of the plaintiffs, charged the jury, "2d, that if they believe all the evidence in the case, the jury must return a verdict in favor of the plaintiffs for all the items in said account, with the exception of the item for services rendered the sister of Hiram J. May." The defendant, Martha May, excepted to the giving of this charge, and said Martha also requested several written charges. The first, to the effect that defendant's separate estate could not be made liable for medical services rendered by a physician to her and her children; the second, to the effect that said Martha's estate was not liable for services rendered to May's children by a former marriage, although they resided in the family at the time; the third, to the effect, if the jury believe the evidence, they should find for defendants. The court refused to give either of these charges, and said Martha excepted.

The jury found "the issues in favor of the plaintiffs, and assessed plaintiffs' debt and interest at the sum of \$69 80," and found that the estate described in the complaint (and the description of which was given in the verdict) was liable for the sum of \$67 39; and thereupon, judgment was rendered against said Hiram J. for said sum of \$69 80 and costs, and the judgment entry then recites: "It is further considered by the court, that said property [setting forth that described in the verdict] belongs to the separate estate of the said Martha May, and is liable to satisfy said sum of \$67 39, as aforesaid assessed, and the costs of this suit, and that an order issue requiring the sheriff to sell so much of said property as may be necessary to satisfy said

May and Wife v Smith, Edwards & McKeithen.

sum of \$67 39 and costs, and that a payment of one of the judgments herein rendered shall be a payment of the other."

The appeal is taken in the name of both the husband and wife, and a *supersedeas* bond given in the penal sum of \$139 36, superseding both judgments. Errors are assigned both jointly and separately, by both husband and wife, in this court, where it was urged as grounds for reversal that the court below erred in the charge given, in the final judgment rendered, and in the refusal to give the charges requested.

W. H. NORTHINGTON, for appellant.—Section 2376 of the Revised Code, when properly construed, only makes the wife's separate estate liable for *articles*, which in their nature are used in common, and which are necessities of the household in its collective capacity, and not for articles which may have been used by the husband or his relations exclusively, although such relations may have resided with him and derived their support from him.—See *Durden and Wife v. McWilliams & Smith*, 31 Ala. 438.

This section of the Code can not be so construed as to make the separate estate of a married woman liable for medical services rendered her or the immediate members of her family. The word "articles," as used in said section, according to the general acceptance of the term and the definitions given by lexicographers, means commodities, and not services. The fact that such services are necessary, or even indispensable, should be entitled to no weight in construing this statute. The services of a lawyer, mechanic, servant or laborer might be equally necessary, and it would hardly be contended that such separate estate would be chargeable in a court of law for services of this kind. This construction of the section in question will operate no hardship, either upon the husband or any one who trusts him. He has the rents, income and profits of his wife's separate property, without liability to account for the same; and the law has given him no authority to

May and Wife v. Smith, Edwards & McKeithen.

charge the *corpus* of her estate to a greater extent.—*Durden and Wife v. McWilliams & Smith, supra.*

The words "household" and "family," as used in this section, evidently have reference to the offspring of the marriage, and not to sojourners or dependents who may be supported by and share the hospitality of the heads of the family; consequently, the children of the husband by a former marriage are not embraced within these terms.

WATTS & TROY, and SADLER & LIVINGSTON, *contra*.—

1. As to the judgment against the husband, there must be an *affirmance*. It is clear, that the judgment against *him* was correct; and he has reserved no question and has taken no exception. Yet he has appealed and given a bond in double the amount of the judgment *against him*; and thus he has *superseded* the judgment *against himself*.

2. Can the husband and wife *join* in an appeal to revise a judgment against the wife's separate statutory estate? Section 2525 of the Revised Code of Alabama expressly provides, that when her *separate* (statutory) estate is involved, the suit shall be in *her own* name. She can not join with her husband in suing out the appeal; and as to *her*, this appeal must be dismissed.

An appeal is a new suit; and this appeal, so far as she is concerned, must be governed by section 2525 of the Revised Code, unless there is some other provision of the Code which governs this particular case.—*Childress and Wife v. Taylor*, 33 Ala. 185; *Spears, Adm'r, v. Lumpkin*, 39 Ala. 600.

3. The judgment rendered against the husband *in personam* is proper, and that against the wife's *property* is correct. No judgment under section 2376 of the Code could be properly rendered against the wife *in personam* in a court of law. This section has been frequently interpreted. *Durden and Wife v. McWilliams*, 33 Ala. 438; *Revesies and Wife v. Stoddart & Co.*, 32 Ala. 601; *Sharp and Wife v. Burns & Cowles*, 35 Ala. 654.

4. The main question in the case is, were these medi-

cines and medical attention, as shown in the evidence, "for the *comfort and support of the household*?"

A "household" is a *family living together*. A family is an aggregate of persons living together in the same house, and others *dependent* on the head for support and maintenance.—See *Allen v. Manassee*, 4 Ala. 555; *Sallee v. Waters*, 17 Ala. 482.

In the case of *Durden and Wife v. McWilliams & Smith*, (*supra*,) on page 442, the court say, "neither do we find anything in the statutes which authorizes us to confine the liability of the separate estate to contracts entered into by the wife herself."

Again, on same page, and in same case, the court say, "We hold, that the intention of the legislature was to render the wife's separate property liable, in an action at law, for only such articles of comfort and support of the household as the husband may be chargeable with *in invitum*; such necessities for the maintenance and comfort of the family, as in the absence of proper provision by him, his wife or even a stranger may supply to the family, and thereby fix a liability on him."

Again, on page 443, in the same case, the court say, "Under the above rule, the separate estate of the wife can not be charged * * for the wearing apparel of the husband, or any other article purchased for his individual or exclusive use. For articles, which in their nature are used in common, and which are necessities of the household in its collective capacity, the separate estate of the wife is chargeable. The fact that the husband participates in the use and enjoyment of the articles last mentioned will not in the least diminish the liability of the wife's separate estate."

5. Are not medicines furnished to the family a charge on the separate estate of the wife? There can be no doubt of it.

Is not the separate estate of the wife liable for medical services rendered to her and to the family, to the *household*? We apprehend, if a cook were employed to cook the meals for the family, there could be no doubt her services in

cooking for the family would be articles of comfort and support of the household, and that the separate estate of the wife would be liable.

A doctor's services, in delivering the wife of a child, in visits to her and the children of the family whilst sick, are as much articles of comfort and support as the cook's services.

6. The children of May by a former wife were members of the family and a part of the household; were *dependent* on him as a part of the family, and were as much a part of the *household* and family as the wife herself, or as his child by her.—See Bump on Bankruptcy, 3d ed., p. 122, and the authorities there cited.

B. F. SAFFOLD, J.—Are the professional services of a physician, and medicines furnished by him to a family, suitable to their degree and condition in life, and for which the husband would be responsible at common law, a proper charge against the separate estate of the wife, under section 2376 of the Revised Code? Are the children of the husband by a former marriage such members of the household or family, when residing in it, as is contemplated by that statute?

The preservation of the property is subordinate to the subsistence of its possessors. Personal service at times is as indispensable to life as food and raiment. The law, in subjecting the wife's separate estate to articles of comfort and support suitable to the degree and condition in life of the family, thus admitting of much expansion, could not have intended to exclude those services of charity and duty which no wealth or position can dispense with, and no poverty or obscurity should be deprived of. There are some services of the physician or surgeon of so costly a character as perhaps ought to debar them entirely, unless in extreme cases, or greatly reduce the compensation usually claimed for them. The essence of a contract, express or implied, must be perceptible in all such demands, to entitle them to a charge upon the property at all, but as the mu-

May and Wife v. Smith, Edwards & McKeithen.

tuality of agreement is imperfect, the creditor can not claim beyond the ability of the estate to respond, in view of more pressing obligations upon it. Under the evidence, the wife's separate estate is subject to the account against herself and her children.—*Owen v. White*, 5 Por. 435; 1 Par. on Contr. 253-6; Rev. Code, § 2376.

The separate estate of the wife is certainly not liable to the extent her husband would be in a corresponding case. A husband is not responsible for the child of his wife by a former husband, but if he takes him into his house, he assumes, perhaps, the responsibility for his maintenance, so long as he retains him as one of his family. Whatever this responsibility may be, it is by virtue of his voluntary undertaking, which can not be said of the wife, or of her estate. The obligation of the husband rests upon as broad a basis as any other of his contracts. The wife can give no legal consent about the matter at all. The principle which would subject her estate to the expenses of her husband's children, would render it liable to his debts generally.—1 Parsons on Contracts, p. 257; *Cooper v. Martin*, 4 East, 76.

The judgment must be treated as single, and reversed entirely. It follows the form prescribed in *Ravesies v. Stoddart & Co.*, (32 Ala. 590,) but that does not admit of joining claims against the husband only, with those which may be charged against the wife's property. The general rule of pleading respecting the joinder of parties and causes of action was not intended to be changed. It would be unjust to burden the estate of the wife with the cost of defending suits against her husband, for which it was not liable.

We prefer Judge STONE's dissenting opinion in the above case concerning the form of the judgment. No particular phraseology is required, so the entry expresses what the judgment should ascertain. A judgment against the husband alone, with execution which may be levied on the property of the wife subject to it, would be sufficient. One against both of the defendants, with execution, in respect

to the wife, to be levied in like manner, would not impose any personal liability on her. The record shows in what capacity she was sued, and the law defines her liability. A judgment against an administrator *de bonis intestatis*, fixes no personal liability on the representative. Neither would one against a wife be satisfied out of property owned by her at an ascertained time.

The judgment is reversed, and the cause remanded.

HUBBARD, GUARDIAN, vs. BAKER ET AL.

[ACTION ON PROMISSORY NOTE.]

1. *Non-suit; when properly taken.*—Where an action, founded on a promissory note, is tried on plea of the general issue and failure of consideration, if on the trial the note is excluded by the court as evidence, on the defendant's objection, the plaintiff may save the point by bill of exceptions, suffer a non-suit, and appeal to this court to have the same set aside under section 2759 of the Revised Code.
2. *Ordinance 38 of 1867; unconstitutionality of third section of.*—The third section of ordinance No. 38 of the convention of 1867, (Pamphlet Acts 1868, p. 185,) is unconstitutional.—*McElvaine v. Mudd*, Adm'r, 44 Ala. 48.

APPEAL from the Circuit Court of Russell.

Tried before Hon. LITTLEBERRY STRANGE.

This was an action brought by the appellant against the appellees, Baker, Bugg & Beasley, to recover the sum alleged to be due on a promissory note, which recited that it was given for the hire of three negro slaves. Issue was joined on the pleas of the general issue, and failure of consideration. On the trial, appellant offered to read the note to the jury as evidence in the cause. The defendant objected, on the ground that "it showed on its face that the consideration for which it was given was the hire of

Hubbard, Guardian, v. Baker et al.

three negroes." The court sustained the objection, and excluded the note from the jury. To this ruling of the court the plaintiff excepted, and a bill of exceptions was signed at his instance, and thereupon he suffered a non-suit, and judgment was rendered against him for costs. The plaintiff appeals to this court to have the judgment reversed and the non-suit set aside.

HOOPER, for appellant.

L. F. MCCOY, *contra*.

PECK, C. J.—1. The exclusion of the note as evidence rendered a recovery by the plaintiff impossible; he therefore very properly suffered a non-suit under section 2759 of the Revised Code.

2. The court below no doubt excluded said note under the third section of ordinance No. 38 of the convention of 1867, (Pamph. Acts 1868, p. 185,) which is as follows: "Sec. 3. And be it further ordained, and it is hereby declared, that there is a failure of consideration, and it shall be so held by the courts of this State, upon all deeds, or bills of sale, given for slaves, with covenants of warranty of title or soundness, or both, and upon all bills, bonds, notes, or other evidences of debt, given for or in consideration of slaves, which are now outstanding and unpaid, and no action shall be maintained there; and that all judgments and decrees, rendered in any of the courts of this State since the 11th day of January, 1861, upon any deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt, based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defense in all actions to said suits; Provided, that settlements and compromises of such transaction, made by the parties thereto, shall be respected."

After the trial of this cause, to-wit, at the January term of this court, 1870, the said third section of said ordinance was declared to be unconstitutional, because it impaired the obligation of contracts.—*McElwaine v. Mudd, Adm'r*,

44 Ala. 48. That decision leaves the ruling of the court below without any legal support.

The judgment must be reversed, the non-suit set aside, and the cause remanded for a new trial. The appellees will pay the costs, &c.

BOGAN vs. McCUTCHEN.

[ASSUMPSIT ON ACCOUNT.]

1. *Contents of letter; when secondary, evidence of, improper.*—Where a letter of one of the parties becomes important evidence on the trial of a cause, if objected to, its contents ought not to be proved, by the oral evidence of a witness, unless it be first shown that the letter itself can not be had, or is lost or destroyed.
2. *Same; what must be proved as to possession of.*—If it be doubtful whether it be in the possession of the person to whom it was addressed, or of the party who wishes to use its contents as evidence, it must be shown that after due diligence has been used, it can not be found in the possession of either.
3. *Secondary evidence; what necessary to authorize admission of.*—What the law requires, before secondary evidence can be given of the contents of a paper, supposed to be lost or destroyed, is, in the language of 1 Greenl. Ev. § 558, “a *bona fide* and diligent search,” that will enable a party to testify that it can not be found, and that he honestly believes it to be either lost or destroyed. If the paper was supposed to be of little value, a less degree of diligence will be demanded, as it will be aided by the presumption of loss which this circumstance affords.
4. *Person in whose custody lost paper belonged, must generally be called to account for loss of.*—If it belonged to the custody of a certain person, or may be presumed to have been in his possession, he must, in general, be called and sworn to account for it, if he is within the reach of the process of the court; and so, if it might or ought to have been deposited in a public office, or other particular place, that office or place must be searched.

APPEAL from the City Court of Montgomery.
Tried before Hon. JOHN D. CUNNINGHAM,

This was an action of assumpsit by McCutchen against Bogan to recover the amount of an account against him for boarding his hack-drivers from June 1st, 1870, to April, 1871.

There was some testimony tending to show that the parties made an agreement in January, 1870, to the effect that Bogan was to pass McCutchen's family and any packages he might send, and stop his hacks and passengers at McCutchen's hotel, and in consideration of this, Bogan's hack drivers were to be boarded free of charge.

The plaintiff introduced one Gillem, who testified, in substance, that he was employed by Bogan as a driver some time in 1870, and on his first trip took a letter from Bogan to his agent, Oliver, at Wetumpka; that witness read this letter, but could not remember whether he had delivered it to McCutchen or Oliver. The witness was about to testify to the contents of the letter, when the defendant objected on the ground that no predicate had been laid for secondary evidence. The court overruled the objection, and defendant duly excepted.

There had been no subpoena to Oliver, or notice to Bogan or Oliver to produce the letter, or any notice to Bogan that the contents of the letter would be offered in evidence. The witness Gillem then stated that the substance of the letter was, that he was to have charge of the hack horses, and board at McCutchen's hotel, and that Bogan would pay for the same, and he did go to McCutchen's hotel and board there some time; and to the admission of this evidence defendant duly excepted.

McCutchen was examined as a witness in his own behalf, and testified that he saw the letter, and that on the faith thereof he had boarded the drivers of defendant, but that he did not know what had become of the letter; that he had searched among his papers for the letter, and could not find it; that he might have overlooked it, if among them, but witness thought it might have been lost or destroyed.

The defendant objected to this evidence, on the ground

that the letter had not been produced or accounted for in any way, and no notice had been given to any person to produce it. The court overruled the objection, and defendant excepted.

The various rulings to which exception was reserved are now assigned as error.

ARRINGTON & GRAHAM, for appellant.

BULLOCK & FERGUSON, *contra*.

PECK, C. J.—The plaintiff below, McCutchen, was improperly permitted to prove the contents of the appellant's letter to his agent at Wetumpka, Oliver, by the oral examination of the witness Gillem. It was secondary evidence, and should not have been admitted, against the defendant's objection, until it was first shown that the primary evidence, the letter itself, could not be obtained. Without this, it did not appear to be the best evidence the nature of the case admitted of. The witness was the carrier of the letter, but could not remember whether he delivered the same to the person to whom it was addressed, or to the plaintiff. Although he stated he had read the letter, yet, as he could not remember to whom it was delivered, his recollection of its contents may fairly be presumed not to have been very full or accurate. The proof of the contents of a written paper, by oral evidence, in the absence of the paper itself, is subject to many of the infirmities of the evidence of verbal declarations. The misapplication or misapprehension, or the omission or addition of a single word may, oftentimes, change the character of the declaration, and meaning of the party by whom it was made. The tone and emphasis, or even the gesture of the person, may give significance to a declaration, all which is lost when repeated by a witness.

For these reasons, such evidence should be cautiously admitted and carefully considered, lest courts and juries may thereby be misled and deceived. But when no better evidence exists, it must be received, for it is the best that

can be done; it is then the best evidence the case admits of. In this case, as the witness could not remember to whom he delivered the said letter, whether to the defendant's agent, or the plaintiff, the secondary evidence, the witness' recollection of its contents, should not have been received, until it was shown that the letter was not in the possession of either, or was lost or destroyed; for, until this was shown, it did not appear that better evidence did not exist. No proof, whatever, was made to show that the letter was not in the possession of the defendant's agent. If within the reach of process of the court, he should have been subpoenaed to produce it, or to prove that after careful examination, it could not be found, or, if he received it, it had been delivered to the plaintiff. The plaintiff was examined as a witness, and stated he had read the said letter; he did not, however, state it was delivered to him by the witness Gillem, or by the agent. It is, therefore, just as probable, and perhaps more so, that it had been shown to him by the agent, to whom it was returned after it was read. If it had appeared that the letter was delivered to him by the carrier, or shown to and left with him by the defendant's agent, he did not satisfactorily prove it was either lost or destroyed. He said he had looked among his papers for it, and could not find it; that he might have overlooked it, but thought it might have been lost or destroyed. We think this shows his examination was not what the law requires, a diligent search. It does not even seem to have satisfied himself, that, if the letter had been delivered to or left with him, it was either lost or destroyed. The best he could say was, that he thought it might have been lost or destroyed. Under the circumstances of this case, this was not sufficient to let in secondary evidence. The plaintiff was a hotel keeper in Wetumpka, and the defendant was running a line of hacks between Montgomery and Wetumpka, and the defendant had introduced evidence tending to show that an agreement had been entered into between plaintiff and himself, by which he was to pass the plaintiff and his family, and any packages he might send,

free, and stop his hacks and passengers at plaintiff's hotel, and in consideration thereof, plaintiff was to board the drivers of defendant and make no charge therefor. It may, therefore, be fairly inferred that the said letter had reference to said alleged agreement, and was the reason why the plaintiff had been permitted to see and read it. Now, if the letter had been produced, it might have shown that defendant's drivers were to be boarded by the plaintiff on the terms of said agreement, in which case the plaintiff's right to a recovery might have been defeated, or the amount of it greatly reduced. At any rate, it was a good reason why the secondary evidence should have been excluded until it was clearly shown that the primary evidence could not be obtained, or did not exist. Furthermore, the plaintiff, from his interest in the matter, it seems to us, would have been more likely to have remembered the contents of said letter, than the witness Gillem, who was a mere driver of defendant's hacks, and without interest; yet the plaintiff, although examined as a witness, and competent to prove the contents as well as the loss of said letter, is altogether silent as to what it contained. This is another reason why the rule as to secondary evidence should not have been relaxed in this case. On the subject of primary and secondary evidence, and in what cases and under what circumstance the latter may be resorted to, I refer to 1 Greenl. Ev. §§ 84, 558, 560, 561.

The judgment must be reversed, and the cause remanded at appellee's costs.

MARX vs. BELL, MOORE & CO.

[ACTION FOR MONEY LOANED, &c.]

1. *Original undertaking; what is, and not within statute of frauds.*—Where money is advanced to A, on the request of B, if the credit is wholly and

Marx v. Bell, Moore & Co.

exclusively given to B, his liability is an original, and not a collateral liability, and so, not within the statute of frauds.

2. *Same; what evidence inadmissible to prove nature of undertaking.*—Where money is advanced to A, on the request of B, if the party by whom the money is advanced directs his clerk, in making the entry on his books against A, to enter opposite the name of A, "B responsible," and B, in an action against him for the money, pleads the statute of frauds, the plaintiff can not introduce such direction and entry as evidence in his own behalf.
3. *Charge to jury; what erroneous.*—A charge that requires the court to determine what the evidence proves, should be refused. Admitting the evidence to be true, it is the province of the jury, and not of the court, to find or determine what it proves.
4. *Impeachment; what can not be made matter of.*—A witness can not be questioned, on cross-examination, about a matter not relevant to the issue, for the purpose of laying a ground to impeach him.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

The facts are sufficiently stated in the opinion.

D. C. ANDERSON, for appellant.

WM. G. JONES, *contra*.

[No briefs reached Reporter.]

PECK, C. J.—This action was brought by the appellees, Bell, Moore & Co., against the appellant, Isaac Marx, to recover one thousand dollars, advanced in fact to appellant's brother, now deceased, Henry Marx, on the written order of said deceased, but by the appellees alleged to have been advanced on the request of defendant, and solely and exclusively on his credit, and that he, and not Henry Marx, was the real debtor. This was denied by the defendant, who insisted that the money was advanced to his said brother on his own credit, and that, at most, he was the mere guarantor or surety of his said brother, and that his undertaking was a "special promise to answer for the debt, default, or miscarriage of another;" and there being no note, or memorandum of the agreement in writing subscribed by him, &c., he was entitled to the benefits of the statute of frauds.

The complaint consists of the money counts, to which the defendant pleaded *non-assumpsit*, and the statute of frauds.

On the trial, the said Bell, the clerk of the plaintiffs, Edward W. Finch, and one A. J. McCants, were examined on behalf of plaintiffs, and defendant and David Ferguson, the clerk of Henry Marx, on behalf of defendant. Other witnesses, not named, were examined by defendant, whose evidence tended to show that defendant was sick and confined to his house on the 2d, 3d and 4th days of November, 1870, and that he was not on the boat on either of those days, as testified to by said Finch. There was a conflict in the evidence, on this point, between the plaintiff's witnesses and the defendant and his witnesses. The evidence of defendant's witnesses, as to this matter, is not set out, or otherwise stated, in the bill of exceptions. All the other evidence is set out at length.

1. The important question in the court below was, whether the money was advanced by the plaintiffs wholly and exclusively upon the credit of the defendant; in other words, whether the evidence proved that he, and not his brother, was the real debtor. If the credit was wholly and exclusively given to the defendant, on the faith of the message sent by him to the plaintiff Bell by the said witness, and clerk of plaintiffs, Finch, then the case was not within the statute of frauds; then his liability was an original, and not a collateral liability. The very words of the statute necessarily mean this. They are, "that any special promise to answer for the debt, default, or miscarriage of another, is void, unless such special promise, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged therewith, or by some other person, by him thereunto lawfully authorized in writing."—Rev. Code, § 1862. Of necessity, there must be some person to answer for some other person, primarily liable, either wholly or in part; otherwise, the promise will be an original, and not a collateral promise, and so, not embraced within the statute;

and thus it was decided by this court, forty years ago, in the case of *Rhodes v. Leeds*, (3 S. & P. 212.) It is there said, that "the uniform, and obviously correct decisions under this statute," (the statute of frauds,) "have been, that if credit is given to A, a promise by B to pay the debt, must be in writing, to be obligatory; but if the credit, in the first instance, is given to B, although the consideration passes to A, it is an original undertaking by B, and he is bound to perform it, although there is no writing."—See, also, *Faries v. Lodanc*, 10 Ala. 50; *Scott v. Myatt & Moore*, 24 Ala. 489; *Sanford v. Howard*, 29 Ala. 684; *Boykin v. McRae*, 37 Ala. 577; *Cahill v. Bigelow*, 18 Pick. 369; *Chase v. Day*, 17 J. R. 114, and note. By most of these cases it is said, if any credit is given to the party deriving the benefit, then the statute of frauds applies, and the promise must be in writing, &c. The changes in the statute since the case of *Rhodes v. Leeds*, (*supra*,) have added to and increased its requirements, but these changes and additions in no wise affect the correctness of this construction of it.

The said question seems to have been very fairly submitted to the jury on the evidence; and we are unable to discover any errors in either of the charges given; both the charges, the one given by the court on its own motion, and the other on the written request of the plaintiffs, distinctly instruct the jury, that if they found from the evidence that the money was advanced or loaned by the plaintiffs solely and exclusively on the credit of the defendant, Isaac Marx, then their verdict should be for the plaintiffs. It would seem the defendant ought not to complain of this.

Under these charges, the jury have answered this question in favor of the plaintiffs. They have said, by their verdict, that the money was advanced wholly and exclusively on the credit of the defendant.

If in this the jury found against the weight of the evidence, the defendant's only remedy was a motion for a new trial. If this had been made and overruled, he must have submitted to the judgment of his peers; it would have been the end of the law. It is beyond the power of this court,

in such a case, to afford relief. I feel constrained to say, however, that after the most critical examination of the evidence, my mind is irresistibly drawn to the conclusion, that the evidence fails to prove that the credit was wholly and exclusively given to the defendant, and that the plaintiffs did, in truth and in fact, in a greater or less degree, look to the said Henry Marx as responsible for the repayment of the money received by him.

Let us look at the evidence of the plaintiff, and witness, Bell. He certainly knows as much about this matter as any one, and, being interested, he may be supposed to have made as good a case for himself and copartners as the truth would permit; but I have no reason to believe, and do not believe, he has done more; and, treating his evidence as true, let us see to what conclusion a fair and impartial construction of it will conduct us. He says, that in the month of October, before the advance of the money was made, Henry Marx and himself were daily passengers on the steamer plying, morning and evening, from Mobile to the eastern shore of the bay; that during such trips said Henry Marx asked him whether his house would let him have \$800 or \$1,000; that he replied they would do so upon two conditions: first, that the loan should be fully secured, and secondly, that the transaction should be the means of securing a profit on business to be derived by means of the loan; that he knew Henry Marx was engaged in business at Demopolis, and that it was usual for merchants at that place to advance money and goods to planters, taking a lien on their crops, and that such merchants usually shipped to Mobile considerable quantities of cotton during the business season, and that he supposed Henry Marx could *secure the loan*, and also make the transaction profitable to them, that is, his house, by sending them cotton to sell, which was their business. He also said, Henry Marx applied again, subsequently, to him, and that he gave him the same answer; that Henry Marx then spoke of cotton liens that he had at Demopolis, and of his ability thereby to comply with the conditions; that Henry Marx then

Marx v. Bell, Moore & Co.

asked him whether plaintiffs would hold in readiness for him \$1,000 about the first of November, and that he, Bell, agreed to do so, subject to the conditions before stated.

He further said, that after this, on the 3d day of November, 1870, David Ferguson, the clerk of Henry Marx, presented an order from Henry Marx on plaintiffs, and that he told him that he had not agreed to let Marx have the money, except upon conditions, of which he had told Henry Marx at the time, and declined to pay the money on the order, but said he would think about the matter, and that he, Ferguson, might call the next day; that Ferguson told him Henry Marx's child was sick, as the reason why he had not come in person.

He further testified, that on the next day, the 4th of November, when Ferguson came in, Mr. Finch, the plaintiffs' book-keeper, whispered to him that Isaac Marx had told him, Finch, to tell him, Bell, if he would let Ferguson have that money, that he, Isaac Marx, would make it all right, and that upon hearing this message from Isaac Marx, *and in consequence thereof*, he let Ferguson have the \$1,000. Witness, said Bell, produced the draft of Henry Marx, and the receipt on the back of it, and made it a part of his evidence, marked in the bill of exceptions, exhibit A, which is in the words and figures following, to-wit:

“Hollywood, Nov. 2d, 1870.

“Messrs. Bell & Moore, Mobile:

“Gents—Please let the bearer, Mr. D. Ferguson, have the money that you have promised me, when I was last in the city.

Yours respectfully,

“H. MARX.”

(Receipt endorsed on the back):

“Received, Mobile, Nov. 4, '70, from Messrs. Bell, Moore & Co., one thousand dollars for account of Henry Marx.

“(Signed) D. FERGUSON.”

Said Bell further testified, that a few moments afterwards he directed Finch, the book-keeper, to enter “Isaac Marx responsible” opposite the entry against Henry Marx

on their books. He further said, that after the death of Henry Marx, about a month or six weeks, he called on Isaac Marx, and demanded payment of the amount; that said Marx said he was in a great hurry, refused to talk with him about it; said that plaintiffs had no order, receipt, or other paper of his for the debt; that he was not responsible, and asked him why he did not file his claim against the estate. He, Bell, further stated, that at the date of the transaction said Isaac Marx was boarding at Montrose, on the eastern shore.

On cross-examination, he stated, that in the conversation with Isaac Marx, he might have asked him about the condition of the estate of Henry Marx, but could not remember how he introduced the subject. He further said, that plaintiffs expected, as cotton factors, to make profit on the transaction, by getting cotton from Henry Marx to sell; said he was willing to trust to Henry Marx for this profit, if debt was secured; that he had probably had conversations before that with Isaac Marx, about the credit and standing of Henry Marx. Thus ends his evidence, from which we see that the negotiation for the loan (so it is called by the witness and plaintiff, Bell,) of the money to Henry Marx, was between Henry Marx and himself, acting in the premises for his house, the plaintiffs, Bell, Moore & Co. He calls it a loan, and it was to Henry Marx on two conditions. 1. That the loan should be fully secured. 2. That the transaction should be the means of securing a profit to the plaintiffs in their business of commission merchants, by cotton being sent to them to sell by Henry Marx. How the loan was to be secured is not stated; the name of Isaac Marx is not mentioned.

When the order or draft of Henry Marx for the money was presented by Ferguson, his clerk,—(It may be here noted that the order is not for \$1,000, or any other sum, but for "the money you have promised me, when I was last in the city,")—Bell, to whom the order was presented, seems to have understood all about it; says nothing about the peculiarity of the order, but tells Ferguson he had not

agreed to let Henry Marx have the money, except on conditions, which, he said, he had told Henry Marx at the time of the negotiation, and he declined to pay the money on the order, but said to Ferguson he would think about the matter, and he might call the next day.

Ferguson accordingly called the next day, and when he came in, then it was that the witness Finch, plaintiffs' book-keeper, whispered to Bell the message sent to him by Isaac Marx, to-wit, that Isaac Marx had told him, Finch, to tell Bell that if he would let Ferguson have that money, that he, Isaac Marx, would make it all right.

Thereupon, without saying a word to Ferguson, he gives him a check for the money, one thousand dollars, and afterwards, as he says in a few minutes, but not until Ferguson had left, he directed the book-keeper, Finch, to enter "Isaac Marx responsible" opposite the entry against Henry Marx on their books, the receipt of Ferguson, on the back of the order, having been taken, "received of Messrs. Bell, Moore & Co., one thousand dollars, on account of Henry Marx." Bell no where says the whole and exclusive credit was given to Isaac Marx; all he says as to this matter is, that he let Ferguson have the money *in consequence of the said message of Isaac Marx*, "that if he would let Ferguson have that money, he (Isaac Marx) would make it all right." This might as truly have been said, and with equal propriety, on the hypothesis that Isaac Marx was merely the guarantor or surety of Henry Marx. Any one who loans money on security may, no doubt, truly say the money was loaned in consequence of the security; and this is all that was said by Bell in this case. If the true interpretation of said message is, that he, Isaac Marx, would see that the money was repaid by Henry Marx, or pay it himself, it amounted to a mere guaranty, and not being in writing, &c., as required by the statute, imposed no legal obligation on Isaac Marx.

Now, let us turn this case over, and look at the other side of it; look at it from another stand-point. Suppose Isaac Marx had died, embarrassed or insolvent, instead of

Henry Marx, and this action had been brought against Henry Marx, on this evidence, would there have been any reasonable doubt of the plaintiffs' right to recover? To my apprehension there would not. It seems to me, in such case, Henry Marx could, with little hopes of being believed, have insisted that the credit was wholly given to Isaac Marx, and that he was in no wise legally liable to repay the money received by him, and for his own benefit, and not for the benefit of Isaac Marx. But however this may be, the jury have interpreted the evidence differently, and their interpretation of it is conclusive, as the case is now presented. In all probability, the plaintiff Bell did not know of the existence of the statute of frauds, or at least of its requirements, but believed the verbal pledge and promise of Isaac Marx, that he would make it all right, bound him as his brother's guarantor and surety, as by the common law he would have been; and this was, in his error, accepted by him as the first condition upon which he agreed to advance the money to Henry Marx, that the loan should be secured.

2. The charges asked by the defendant were properly refused. They required the court to determine what the evidence proved. This was the peculiar province of the jury. Admitting the truth of the evidence, it was for the jury, and not the court, to say whether it proved that Isaac Marx was the principal debtor, or only a surety or guarantor for his brother Henry Marx; in other words, whether it proved that the money was, or was not, advanced or loaned wholly and exclusively upon the credit of Isaac Marx. Evidence is not facts; it is only a means of proving facts; and what fact or facts the evidence proves must be found by the jury, and not the court. When the facts are found, the court may declare the law on the facts found.

If the charges had been so framed as to have instructed the jury, that if they found from the evidence any credit was given to Henry Marx, their verdict should be for the defendant, then they would have been proper charges, and to refuse them would have been error.

3. So far, I have found no available error in the record. During the progress of the trial, several exceptions were taken by the defendant to the admissibility of evidence offered by the plaintiffs. The first refers to the evidence of the plaintiff Bell. He stated that a few moments after the check for the thousand dollars was given to Ferguson, the clerk of Henry Marx, he directed Finch, the book-keeper, to enter "Isaac Marx responsible" opposite the entry against Henry Marx on their books. The book-keeper said the entry was so made the next morning. The defendant's objection to this evidence was overruled. We think it should have been sustained. It was admitting the declaration and act of one of the plaintiffs, in relation to this matter, in the absence of the defendant, as the person by whom the order was presented, and to whom the check for the money was given, to be used as evidence in their own behalf. If this could be done, by the same rule the book-keeper might have been directed to make the entry, "credit wholly and exclusively given to Isaac Marx," and thus, by their own direction and act, have proved the very matter in dispute. This clearly could not be done. It would be, to permit the plaintiffs to make evidence for themselves.

The second exception refers to, substantially, the same evidence, when offered to be proved by the book-keeper, Finch, which was objected to by defendant, but admitted. This evidence should have been excluded, for the reasons given for excluding the evidence of the witness Bell to the same matter.

The third exception grows out of a question put to the defendant by the plaintiffs, on cross-examination, who was examined as a witness for himself. After denying the conversation with the witness Finch, about letting Ferguson have the money and he would make it all right, he was asked by plaintiffs whether he would have indorsed for his brother, Henry Marx, at the time of said transaction. To which he answered he would not. The plaintiffs then asked him whether, in the month of October, he had not told Mr.

McCants, cotton factor in Mobile, that if he would advance to his brother, he would be responsible for it? Defendant objected to this question, and the evidence sought to be elicited, as irrelevant and incompetent. His objection was overruled, he was required to answer, and he excepted. In answer to this question, he said he had two brothers; that he did not recollect of making such a proposal to Mr. McCants; if he did so, it was probably for his other brother, and not for Henry. The plaintiffs then called said McCants as a witness, who stated that Isaac Marx, in October, 1870, told him that his brother would probably want some money, and that he would be responsible for any sum he might obtain; that he did not desire the money for himself, but for his brother. Some weeks afterwards, he asked Isaac Marx whether he wanted the money, and he said his brother had been supplied; that he did not mention which of his brothers it was. To this examination and evidence of said McCants, defendant objected; his objection was overruled, and he excepted. The purpose of this evidence was, and, if competent, was competent for no other purpose, but to impeach the defendant's credibility. Was it competent for this purpose?

Mr. Greenleaf says, "the credit of a witness may be impeached, by proof that he has made *statements out of court contrary to what he has testified at the trial.* But it is only in such matters as are relevant to the issue.—1 Greenl. Ev. § 462, and note.

I have had some difficulty in understanding what this author means by the words "*relevant to the issue.*" Do they mean the issue made up between the parties to the case on trial; or may they embrace some side, collateral issue, raised on cross-examination of a witness, for the purpose of impeaching him, as to a matter not relevant to the real issue between the parties? After the best thought and examination I have been able to give the question, my opinion is, that they refer to the former; to the issue in the cause; that a party can not be permitted, on cross-examination of his adversary's witness, to inquire of him what

he may have stated, either in or out of court, as to a matter not relevant to the issue in the cause, or some issue not necessarily arising on the trial, for the purpose of contradicting such witness, and thereby to impeach him.

In *Ortez v. Jewett & Co.*, (23 Ala. 662,) it is decided, that the evidence of a witness on a point not in issue can not be contradicted, nor can the witness be questioned about a matter not relevant to the issue, to lay a ground to impeach him. In *Dozier v. Joice*, (8 Porter, 308,) it is ruled, that a witness can not be examined to any distinct collateral fact, for the purpose of afterwards impeaching his testimony, by contradicting him. But if a witness voluntarily swears falsely in relation to matters not within the issue, he may be impeached, by contradicting him. On this subject, see *Shields v. Cunningham*, 1 Blackf. 86; *United States v. Dickinson*, 2 McL. Rep. 325; *The State v. Patterson*, 2 Iredell's Rep. 346.

If forty witnesses in this case had sworn that defendant told McCants, in October, 1870, that his brother would probably want some money, and that he would be responsible for any sum he might obtain, it would not have made out even a *prima facie* case for the plaintiffs; it would have been worthless evidence to prove the issue between them and the defendant, and therefore irrelevant, and no question for impeachment could be based upon it. For these reasons, the objection to the question put to the defendant by plaintiffs, as to what he had told McCants, should have been sustained, and evidence of McCants to contradict his answer should have been rejected. The court below erred as to both these matters.

For the errors named, the judgment is reversed, and the cause remanded, at appellees' costs.

ROPER *vs.* DAY.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN.]

1. *Vendor's lien; what constitutes.*—Where land is appropriated to the payment of a debt, by authority given to the creditor to sell it for that purpose, the note of the vendee payable to such creditor, in pursuance of the agreement, carries with it the vendor's lien.
2. *Same.*—If a vendee who has not paid the purchase-money, sell the land, requiring his purchaser to satisfy such outstanding liability, and it is done by the substitution of the purchaser's note, the vendor's lien accompanies the note as a transfer of the right to receive the purchase-money, to the exclusion of a balance due to such vendee; especially when the original creditor only consents to the arrangement on that condition.
3. *Same; who entitled to enforce vendor's lien.*—If one, to whom the original creditor has assigned the note of the last purchaser, buys the land from him in consideration of it, the vendor of the purchaser may, by paying the note, have a decree for the sale of the land in satisfaction of a balance due him,

APPEAL from the Chancery Court of Shelby.

Heard before Hon. B. B. McCRAW.

The facts are sufficiently stated in the opinion.

MORGAN, LAPSLEY & NELSON, for appellant.

COBB & LEWIS, *contra*.

B. F. SAFFOLD, J.—The appellee obtained a decree enforcing the vendor's lien on land in the possession of the appellant.

The case was this: The complainant sold the land to Edwards. But he had purchased it by contract with Joseph Roper, receiving a deed from O'Hara, and a quit-claim conveyance from Roper. He did not pay any money on this purchase, but gave to Roper his own notes for a part, and two notes on Crone payable to himself. When he sold to Edwards, he required him to procure and return to him by any arrangement he might be able to make, the notes

Roper v. Day.

which he had given to Roper, and to make a note payable to him for the balance of the price. Edwards complied with this agreement, by giving his own note to Roper in lieu of Day's and Crone's notes, which he received from Roper, and handed to Day, without telling him at the time how he had obtained them. He then executed his note to Day for the balance of the purchase-money. This note is the one for which the lien is claimed in the bill. Edwards' note to Roper is expressed to be in consideration of the land in controversy. The defendant, Roper, says that this note of Edwards was given to him by Joseph Roper, his grand-father, and he bought the land from Edwards with it. He claims that it sustained a vendor's lien superior to that set up by the complainant.

The vendor's lien is a creature of the court of equity. It does not exist by contract, and it imposes no personal obligation. It follows the purchase-money and attaches to the land. No higher or better derivation need be searched for than the dictate of justice, that land shall not pass from its owner to another without a consideration paid. Indestructible and immovable, it shall abide with him who has the best right to it, *in foro conscientiae*.

The lien exists wherever a sale of land takes place without payment of the purchase-money; and the burden of proof is on the purchaser to establish that, in the particular case, it has been intentionally displaced or waived by the parties. If, under all the circumstances, it remains in doubt, then the lien attaches.—2 Story's Eq. Jur. § 1224.

When Day bought the land, this lien attached to it in favor of somebody. If that person was O'Hara, Day believed that he had appropriated the land to the payment of his debt to Roper. Under this conviction, he paid Roper for it in notes, and obtained the title he expected, and about which he has not since been troubled. If Roper had, as surety for him, satisfied O'Hara's claim, even with his own against O'Hara, he would have been entitled to be subrogated to his rights.—1 Lead. Ca. in Eq. (H. & W.'s notes) p. 143. If he had purchased from O'Hara, and immedi-

ately sold again to Day, giving to him O'Hara's deed, the relation of vendor and vendee would have existed, and with it the lien. Crone's notes were not such security as avoided the lien in the face of the manifest intention of the parties that it should exist, as shown by Day's testimony.—2 Story's Eq. Jur. § 1226. The plain deduction from these admitted propositions is, that Roper acquired a lien as against Day on this land.

When Day sold to Edwards, he expressly required that his personal obligations to Roper, including Crone's notes, should be returned to him. It was an appropriation of the purchase-money to the payment of these debts. He said he could not make a title until Roper was satisfied, who was not willing to give them up lest he might lose his lien on the land. This requisition was tantamount in equity to an assignment of so much of the purchase-money to Roper, giving it a preference of lien over what he retained. *Grigsby v. Hair*, 25 Ala. 327; *Cullum v. Erwin*, 4 Ala. 452. It must be observed, that Day imposed no restriction on the manner of Edwards' obtaining his notes from Roper, and stipulated for no security for what was to be paid to himself. He relies on the vendor's lien, which is the exclusion of any other.

If Day had taken notes from Edwards and transferred them to Roper, there could have been no doubt of the priority of Roper's right. On what principle, applicable to this subject, can such a case be distinguished from that of Roper's accepting Edwards' note payable to himself in exchange for Day's notes? The cases cited by the appellee, *Dennis v. Williams*, (40 Ala. 633,) and *Bradford v. Harper*, (25 Ala. 337,) are not authorities in opposition to the similarity. The former is based on the idea that the second note was taken in lieu of the first, which was intended to be *paid*. While the first is held to have been extinguished, it is plainly intimated that the second is a lien on the land against the sub-purchaser. The latter simply declares the well-known principle, that the transfer of the note carries also the lien. But in this case Roper

Bozeman v. Allen.

expressly reserved his lien in the note taken from Edwards, thereby declaring that he did not take it in payment, but rather in renewal of the others. What equity can intervene in favor of Day when he has not paid any thing for the land?

The defendant holding the note as a prior lien, bought the land from Edwards with it. He is sub-purchaser from Day, with a full knowledge on the part of both of all the equities of each. If Day is willing to refund him his purchase-money, with interest, the powers of the equity court are extensive enough to decree a sale of the land for his benefit.

The decree is reversed, and the cause remanded.

BOZEMAN vs. ALLEN.

[ACTION ON PROMISSORY NOTE.]

1. *Contract, consideration of; what renders void as to immediate parties to.*—When a part of the consideration of a contract is illegal, the contract is void as between the immediate parties to it, who have knowledge of the illegality; and as between these it can not be enforced.—32 Ala. 288.
2. *Same; as to when illegal consideration will not avoid contract.*—But if such contract be a negotiable promissory note in the hands of an indorsee who is a *bona fide* holder for valuable consideration, without knowledge of the illegality, this rule of law does not apply. Such indorsee may recover on such note, notwithstanding the illegality, (3 Kent, 79, 80,) unless some statute declares the contract a nullity *ab initio*.
3. *Negotiable note, given in part for Confederate money; void as to immediate parties to note.*—A negotiable promissory note, the consideration of which is partly a loan of Confederate treasury-notes and partly a sale of goods, is void as between the immediate parties to it, but it is valid in the hands of an innocent indorsee, who is a *bona fide* holder for valuable consideration, without notice of the illegality, unless it be made wholly void by statute in the hands of such indorsee.

APPEAL from Circuit Court of Hale.

Tried before Hon. M. J. SAFFOLD.

The facts are sufficiently stated in the opinion.

SOMERVILLE & McEACHIN, for appellant.

PITTMAN & WALLER, *contra*.

PETERS, J.—On the 1st day of May, in the year 1870, Allen, the appellee, commenced suit by summons and complaint against Bozeman, the appellant, in the circuit court of Hale county. The complaint contains two counts. One is upon a stated account for \$3,017 18, rendered on September 21st, 1863. The other is a count upon a promissory note executed by the defendant on the *first* day of September, 1863, payable one day after date to the order of W. W. Allen & Co., for the sum of \$5,817 18, which note was indorsed by the payees to the plaintiff. In answer to the complaint, the defendant pleaded three pleas in short by consent: 1. The general issue; 2. Illegal consideration; 3. Statute of limitations of six years. Issues were taken upon all these pleas, and the parties went to trial on the issues thus made. The cause was submitted to the jury upon the evidence of the note and an agreed statement of facts, which was in the following words, that is to say: "Of the amount of the note sued on, which is for \$5,817 18, the sum of \$2,800 is Confederate money or treasury-notes advanced or loaned by W. W. Allen & Co., the payees of said note. A part of said Confederate money was advanced in 1863, and a part in 1862. The balance of said note, to-wit, three thousand and seventeen dollars and eighteen cents was for a good consideration, being for goods, &c., sold and money advanced to defendant, by Allen & Co., for several years before the war, to-wit, between the years 1854 to 1858. The said sum of twenty-eight hundred dollars was paid to third persons on orders or drafts drawn in favor of third persons by said Bozeman on Allen & Co., and were charged to him as money paid to his use and account."

This was all the evidence; and on this evidence the court charged the jury:

1. "That the plaintiff is entitled to recover the amount

of the note sued on, less \$2,800; that is to say, he is entitled to recover \$3,017 18, with interest thereon from the maturity of said note."

This charge was excepted to by the defendant; and thereupon the defendant moved the court to give the following charges:

1. "If the jury believe the evidence, they must find for the defendant."

2. "If the jury believe that a part of the consideration of the note sued on was Confederate States treasury-notes, or Confederate money, loaned by the payees to defendant, then the said note is illegal and void, and there can be no recovery in this action under the first count."

These charges were also refused by the court, and the defendant excepted.

In the case of *Hickman v. Jones*, (9 Wall. 197-200,) it is said by the highest court of the Union, that "the rebellion out of which the war grew was without any legal sanction. In the eye of the law, it had the same properties as if it had been the insurrection of a county or smaller municipal territory against the State to which it belonged. The proportions and duration of the struggle did not affect its character. Nor was there a rebel government *de facto*, in such a sense as to give any legal efficacy to its acts. It was not recognized by the national, nor by any foreign government." It was, then, but an organized insurrection to separate a portion of the States of the Union from the territory of the Union. In whatever light such an effort may be regarded as a revolutionary act, it was in point of law illegal and criminal; and every act in aid of it is necessarily impressed with the same illegal character. The history of the large quantities of what is called Confederate treasury-notes, or Confederate money, issued and put in circulation by this organization, called "The Confederate States Government of America," is too well known to doubt that these treasury-notes were so issued and put in circulation to aid the success of the rebellion. They were not issued for any of the peaceful purposes of life or of peaceful commerce.

For these purposes they were not needed. The specie and the bank currency of the seceding States was amply sufficient for all these demands. They were then issued solely as a war currency, and for the military exigencies of the so-called Confederate States. This must have been well known to all who handled them. To circulate them gave them currency, and to give them currency was to aid the cause that called them into being. Their circulation was an illegal act. For this reason, among others, this court has decided that the loan of them was not such a consideration as would support a valid contract. But this was where the whole consideration of the contract was a loan of Confederate money.—*Lawson v. Miller*, 44 Ala. 616. A like conclusion has been reached by the supreme court of Tennessee.—*Potts et al. v. Gray*, 3 Cald. 468; *Hale v. Sharp et al.*, 4 Cald. 275. But in this case, the consideration of the note sued on is not based wholly upon a loan of Confederate treasury-notes. A larger part of the consideration was legal and sufficient. Does this alter the character of the contract? From a very early day it has been repeatedly decided, in the courts of this country and in England, that it does not. Where a part only of the consideration of a contract is illegal, the whole contract is void and can not be enforced.—*Waite v. Jones*, 1 Bing. New Cases, 656; *Jones v. Waite*, 5 Bing. New Cases, 341; *Scott v. Gillmore*, 3 Taunt. 226; *Bingham v. Potter et al.*, 14 Gray, 522; *Pettit's Adm'r v. Pettit's Dist'r*, 32 Ala. 288; 1 Par. Notes and Bills, 217; 1 Par. Contr. p. 456, 5th ed. 1864. This is the settled law as between the immediate parties to the contract, who have knowledge of its illegality; but it changes when the instrument passes into the hands of a *bona fide* holder for valuable consideration, without notice of its illegality, except in such cases as the contract is made utterly null and void by statute.—Chit. Bills of Ex. p. 82 (marg.), 12 Am. ed. by Perkins, 1854; 3 Kent, 79, 80; *Hanrick v. Andrews*, 9 Por. 10, 11; *Swift v. Tyson*, 16 Pet. 15. The plaintiff in the court below is an indorsee, and it does not appear that he became the holder of the note after it

Bozeman v. Allen.

became due. The note is negotiable, and *prima facie* Allen, the plaintiff, is a *bona fide* holder.—3 Kent, 77, 79; Story's Bills of Ex. § 60. In such a case, his right to recover can not be defeated by the illegality of consideration which would have barred a recovery at the suit of the payees against the maker. In this view of the law, the charge given and excepted to by the defendant below was only too favorable to him, under the facts set out in the record. And the charges asked were properly refused.

The judgment of the court below is, consequently, affirmed.

NOTE BY REPORTER.—At a subsequent day of the term, the appellant applied for a rehearing. This application did not come into the Reporter's hands. The following response was made by

PETERS, J.—The court is of opinion that the rehearing should be allowed. There was a plea of illegal consideration, and some evidence to sustain it. This, under the law as settled in this State, puts the *onus* of proof on the plaintiff to show that he is an indorsee and holder for valuable consideration.—*Battle v. Weems*, 44 Ala. R. 105, and cases there cited. The original opinion in this case is, therefore, modified to this extent.

The judgment of the court below is, therefore, reversed, and the cause is remanded for a new trial.

WILKERSON, ADM'R, *vs.* McDOUGAL.

[DETINUE FOR SLAVES.]

1. *Detinue for slaves ; when emancipation no defense to.*—To an action of detinue for the recovery of slaves, commenced in 1852, it is no defense that the slaves were emancipated before the trial.
2. *Same ; what will defeat action.*—In such action, the plaintiff's right of recovery is defeated by the passage of his title to another before the trial, unless the defendant is a mere trespasser ; but not by its extinction on account of the destruction of the property, whether by death, emancipation or otherwise.

APPEAL from the Circuit Court of Russell.

Tried before Hon. LITTLEBERRY STRANGE.

This suit was commenced in March, 1852, and was an action of detinue for the recovery of slaves, by the appellant against the appellee. It lingered by successive continuances until the fall term of the court in 1869, when the defendant demurred to the complaint on the ground that slavery having been abolished in the State, the plaintiff can not recover. This demurrer was sustained, and judgment was rendered in favor of the defendant. The sole question for consideration is the sufficiency of the demurrer.

HOOPER, for appellant.

STONE & CLOPTON, *contra*.

B. F. SAFFOLD, J.—The matter of demurrer ought to have been pleaded *purs darrein continuance*. But we will consider its sufficiency as a defense.

It is conceded that the destruction of the property would not affect the question of recovery. The point is made, that the plaintiff's title to the slaves failed before the trial,

Wilkerson, Adm'r, v. McDougal.

and therefore he is not entitled to a judgment for the specific property, or its value. The defendant may defeat the action in these particulars, by showing a superior title in a third person, with which he connects his own, whether it existed prior to the commencement of the suit, or was obtained afterwards.—*Cole v. Conoly*, 16 Ala. 271; *Dozier v. Joyce*, 8 Por. 303.

Why is it that the plaintiff's right of recovery is unimpaired by the death or destruction of the property, but effaced by a superior outstanding title? Perhaps there is no good reason for the difference. One which may be assigned is, that the governing principle is not the divestiture of his right, but the passage of it to another, who thereby acquires a cause of action. The defendant is not to be placed in any better or worse condition. The cause of action continues, but is transferred. The discovered owner and the defendant may adjust their controversy as they choose. The plaintiff would be accountable to the former, if allowed to recover, and a multiplicity of suits would be avoided. When the property is destroyed, the defendant's accountability, none the less in either case, is only to the plaintiff. The owner might not have lost his property, if injury had not been done to his possession of it, and the wrong-doer must not be allowed to take any advantage from his wrong. The defense is not sufficient.—*Rose v. Pearson*, 41 Ala. 687; *McElvain v. Mudd*, 44 Ala. 48.

The judgment is reversed, and the cause remanded.

PETERS, J.—I assent to the judgment of reversal, but not to the reasons on which it is founded.

STEADMAN *vs.* SEAWELL & MINSHILL.

[GARNISHMENT.]

1. *Judgment in circuit court on appeal from justice's court; when void.*—A judgment by default rendered in the circuit court, on the trial of an appeal from a justice, against the appellee, who has not been notified of the appeal, will be reversed.

APPEAL from the Circuit Court of Marengo.

Tried before Hon. M. J. SAFFOLD.

The facts are sufficiently stated in the opinion.

J. C. COMPTON, for appellant.

EUGENE MCCAA, *contra*.

B. F. SAFFOLD, J.—The appellant was garnishee in an attachment suit commenced by the appellees against W. W. Steadman, before a justice. That court refused to render judgment against him on his answer, but *allowed* him to answer over, or appear before him at an appointed time to show cause why judgment should not be given against him. No further action seems to have been taken in the matter by the justice. The plaintiffs appealed to the circuit court, but no notice of the appeal is shown to have been given to the garnishee. Judgment by default was there rendered against him without jurisdiction obtained of his person.—Rev. Code, §§ 3260, 3295.

The judgment is reversed, and the cause remanded.

SPRAGINS ET AL. *vs.* TAYLOR, ADM'R.

[PETITION TO VACATE AND SET ASIDE SALE OF DECEDENT'S LANDS, &C.]

1. *Decedent, sale of lands of; when order for not void.*—An executor's or administrator's sale of the lands of a decedent, under order of court, to pay debts, is not void, if it appears from the record of the proceedings on the application in the probate court for such order, that a proper application or petition made by such executor or administrator was filed in the proper court, and that the parties interested had proper notice of the application before the order was granted.—Rev. Code, § 2222; 41 Ala. 26, 39.
2. *Same; jurisdiction of probate court to order sale; when attaches.*—The filing of the application or petition for the order of sale by the executor or administrator, containing the proper allegations, and descriptions of the land and parties, as required by the Code, gives the court jurisdiction to hear and determine the case by order or decree.
3. *Same; effect of irregularities after jurisdiction attached.*—And whatever irregularities may intervene after jurisdiction attaches by filing the application for sale, are but errors; and they do not render the judgment of the court void for want of jurisdiction; unless it is shown that there has been some neglect of a statutory requirement, which declares the proceeding void on that ground.—Rev. Code, § 2225.
4. *Same.*—The facts, that the petition or application is signed in the name of the petitioner "by his attorney;" that the petition or application is not verified on oath; that no guardian *ad litem* was appointed for the minors interested in the estate to be sold before the hearing, or that the report of the sale was not verified by the oath of the petitioner, do not render the sale void or defeat the jurisdiction of the court. These are but irregularities or errors which do not render the judgment or order of the court a nullity.

APPEAL from the Probate Court of Madison.

Tried before Hon. L. M. DOUGLAS.

The-opinion states the facts.

WALKER & BRICKELL, for appellants.

J. G. COCHRAN, *contra*.

PETERS, J.—On the *second* day of September, 1871, the appellee, Taylor, as the administrator *de bonis non*, with

the will annexed, of George W. Carmichael, deceased, filed his petition in the probate court of Madison county to vacate and set aside a sale of the lands of said deceased, as void, which had been made under authority of an order of the same court, granted to Daniel L. Carmichael, who was at the time executor of the last will and testament of said George W. Carmichael, deceased, and duly authorized, qualified and commissioned as such executor. The order thus assailed was granted in 1866. And it is assailed upon the ground that the court had no jurisdiction in 1866 to order said sale; and "the reasons" why said sale is alleged to be void are the following: 1. The petition asking said order "was not signed by said Daniel L. Carmichael, nor verified by his oath, as required by law." 2. "That the papers and records of this court," (probate court of Madison county) "pertaining to said estate, no where show that guardians, or guardians *ad litem*, were appointed to represent the minor heirs interested in said estate." 3. "That no depositions were taken as required by law, and, therefore, all orders and decrees for the sale of said land are void." 4. That the report of sale of that portion of said lands sold to Harrietta Aday "was never signed by Daniel L. Carmichael as executor, nor verified by his oath; and for the reasons above stated said sale is void."

Notice was issued to the parties interested in said sale of said lands, advising them of the contents and of the prayer of said petition of said appellee. There was a bill of exceptions taken at the hearing of this petition, and the court below set aside and vacated the sale of said land in conformity with the prayer of said petition. It appears from the bill of exceptions taken by appellants on the trial below, that there was a proper petition filed by said executor asking for the sale of said lands. In this petition is this recital, to-wit: Petitioner "shows that at his death the said George W. Carmichael owed debts to a large amount, and that petitioner has not assets in his hands sufficient to pay the same without a sale of the said lands; that the personal property left by said George W. is not sufficient

Spragins et al, v. Taylor, Adm'r.

for that purpose; that the said last will and testament of said George W. confers no power upon petitioner to sell said lands for payment of debts, or for any other purpose. Wherefore, he prays this court to grant him an order to sell said lands for the purpose of paying said debts; that citation issue and publication be made as required by law," &c. This petition is signed as follows: "Daniel L. Carmichael, by his attorney, Richard B. Brickell." At the bottom of this petition is the following entry:

"The State of Alabama, } Before me, Robert D. Wil-
Madison county. } son, judge of the probate court
in and for said county, personally appeared Daniel L. Carmichael, who makes oath that the facts set forth in the foregoing petition are true.

"Sworn and subscribed, April 13, 1866.

"Judge P. C."

It appeared by said petition that a portion of the distributees of the estate of said deceased, who were interested in the sale of his lands, were minors. On the filing of said petition, a day was appointed to hear the same, and the parties interested in said estate entitled to contest the same were ordered to be notified as required by law. But it does not appear that any order appointing a guardian *ad litem* to defend the interests of the minors was then made, or that said minors had any general guardian. It also appears from the order appointing a day to hear said petition, that this further recital is made, to-wit: "Daniel L. Carmichael, executor of the last will and testament of said deceased, having this day filed *application in writing*, and *under oath*, praying for an order and proceedings to sell certain real estate, in said application described, of the property of said decedent for the purpose of paying the debts due from said estate, upon the ground that the personal property of the estate is insufficient for the purpose." It further appeared that the order granting authority to sell said lands, omitting the description of the lands, was as follows; that is to say:

“George W. Carmichael, dec’d. } This day came on for
Order to sell lands. } hearing the application
of Daniel L. Carmichael, executor of the will of said de-
cedent, for an order to sell certain lands in said application
described, for the purpose of paying debts due from said
estate, and all parties in interest having been brought into
court, by citation personally served and by publication in
a newspaper, &c., in all respects strictly according to the
order of this court, made and entered in the premises on
the 13th day of April, 1866. Now comes the said execu-
tor, by his attorney, and moves the court that said appli-
cation be granted; and it being proven to the satisfaction
of the court, by the oaths of James Wells and Andrew J.
Schrimsher, who are disinterested witnesses, and whose
testimony has been taken by deposition and upon direct in-
terrogatories, as in chancery cases, and which testimony
has been filed of record in this proceeding, that the per-
sonal property is insufficient to pay the debts of said estate,
and that it is necessary to sell the lands described, as fol-
lows:” * * “for the purpose of paying the debts due from
said estate, according to the prayer of said application. It
is therefore ordered, adjudged and decreed, that said ap-
plication be granted, and the said executor is hereby or-
dered to sell the above described lands at public outcry, in
manner and form as the law directs in such cases, after
having first given notice for at least three successive weeks
of the time and place and terms of the sale, together with
a description of the property, in the *Huntsville Advocate*,
a newspaper published in said county; said sale to be made
for cash.”

The land mentioned in the application was regularly sold
under this order, and in conformity to the same, and the
sales confirmed and deeds made to the purchasers. The
court below granted the prayer of the petition, and vacated
and set aside the sale.

It is evident from this statement of the material facts of
this case, as shown by the record, that “the reasons” al-
leged in the petition for the relief asked are not sustained.

Spragins et al. v. Taylor, Adm'r.

The record, as between the same parties or their privies, imports absolute verity, and they are estopped from denying the truth of its recitals.—*Deslonde et al. v. Darrington's Heirs*, 29 Ala. 92; *Weir v. Hoss*, 6 Ala. 881; *Swift v. Stebbins et al.*, 4 Stew. & Por. 447. Here the record shows that the executor of George W. Carmichael deceased, who sold the land in controversy, “filed his application in writing and under oath.” It is true, that the petition or application found in the record is signed by the executor, “by his attorney.” If the executor chose to adopt this mode of signing his name to the application, and it was received and treated as such both by the court and himself, as it was, this is sufficient. The statute does not forbid this, or prescribe a mode which would render it a nullity. It is only required that the application shall “be made by the executor, and verified by oath.”—Rev. Code, §§ 2222, 2080, 2081. If, along with these particulars, it contains an accurate description of the lands sought to be sold, and gives the names of the heirs and devisees and their places of residence, and states, if any, and which of such heirs or devisees are under the age of twenty-one years, or married or of unsound mind, it is sufficient to give the court jurisdiction.—Rev. Code, § 2222, *et supra*. The record shows that all this was very carefully done. In the case of *Satcher v. Satcher's Adm'r*, this court declare, that “it is the settled doctrine in the decisions of this court, that the proceeding before the probate court, for the sale of the lands of a decedent, is *in rem*; that the jurisdiction of the court attaches upon a petition setting forth a statutory ground of sale; and that the order of sale is not void, although the proceedings may abound in errors, if the petition contains the above stated jurisdictional allegation. This doctrine is beyond the pale of controversy in this court.”—*Satcher v. Satcher's Adm'r*, 41 Ala. 26, 39; *King v. Kent*, 29 Ala. 542; *Field v. Goldsby*, 28 Ala. 218. The application of the executor in this case, as the order for the sale shows, fully complies with all the requisitions of the statute necessary to give the court jurisdiction. When this is

•

once done, then subsequent irregularities are errors merely, and can not be amended in this way, unless they are such irregularities as, by force of the statute, will render the decree void. This is the doctrine most emphatically declared, not only in the cases above cited, but it is one that is approved by the highest court of the Union.—2 Howard, 319. The filing of the application containing the proper allegations, clothes the court with authority to render some decree. This authority is its jurisdiction.—6 Pet. 691, 706. Here jurisdiction must attach before the order appointing the guardian *ad litem* could be made; because it could not be made before the filing of the application for the sale. If made afterwards, as it must be, and may be, then it is an order subsequent to the jurisdiction; and a failure to make it is but an irregularity which is amendable, and does not vitiate the whole proceeding. It does not make the application itself a nullity. A reversal on this account would not destroy the suit, but only reverse for a new trial, after the appointment of a guardian *ad litem*. This “reason” was insufficient to destroy the sale made by the executor, and deprive the court of jurisdiction.

The objection, that no depositions were taken as required by law to prove the allegations of the application, is not sustained by the recitals of the record. The very reverse is recited in the order for the sale. This recital is conclusive against the administrator *de bonis non*, if there was no fraud in making the decree and order for the sale, a thing not pretended. This objection would be one of great difficulty under our present law, but it does not exist in this case.—Rev. Code, § 2225; 41 Ala. 26, 49.

The objections to the confirmation of the sales are mere errors, not available in this proceeding. They occurred after jurisdiction had attached, and can not render the decree of the court a nullity. This is necessary to defeat the sale. The return or report of the sale should have been made on oath, but it is now too late to object to it; and it could have been amended in the court below.—Rev. Code, §§ 2091, 2072; see, also, *Duval's Heirs v. The P. & M.*

Bank et al., 10 Ala. 636, 650; *Duval v. McLoskey*, 1 Ala. Rep. 708.

A careful examination of the case made in the bill of exceptions satisfies my mind that the learned judge in the court below mistook the law, or he failed to allow proper significance to the facts shown in the record of the proceedings on the application for the order for sale by the executor. For this, the judgment of the court below must be reversed. But as the petitioner, said Taylor, administrator as aforesaid, is entitled to amend his petition, if he can, and is so advised, the cause will be remanded with instructions to the court below, to permit the petitioner to amend his petition in conformity with the law as herein laid down, and if he fail to do so, that said petition be dismissed with costs.

The judgment of the court below is reversed, and cause remanded with instructions to proceed in conformity with the law, as declared in this opinion. The appellee will pay the costs of this appeal in this court and in the court below.

SHORTER, PAPOT & CO. *vs.* HIGHTOWER.

[ACTION ON ACCOUNT.]

1. *Copartnership; when can not be sued for debts of old firm, a portion of the partners of which, constitute new firm.*—A new firm, though composed entirely of a portion of the members of a former partnership which is dissolved, can not be sued jointly in their firm name for the liabilities of the old firm.
2. *Same; when appeal from justice court may be tried.*—There is no error in trying an appeal from a justice at the first term of the circuit court, after the day set for its hearing, though other cases not reached precede it on the docket.
3. *Damages allowed in case of appeal for delay; how assessed.*—The damages allowed by section 2774 of the Revised Code in appeals from justices, when taken for delay, must be imposed by the court, not by the jury.

Shorter, Papot & Co. v. Hightower.

APPEAL from the Circuit Court of Barbour.

Tried before Hon. J. McCaleb Wiley.

The facts are sufficiently stated in the opinion.

SEALS & WOOD, for appellant.

MORGAN, BRAGG & THORINGTON, *contra*.

B. F. SAFFOLD, J.—The suit being by the appellee, Hightower, against the appellants, Shorter, Papot & Co., the defendants objected to the introduction of an account against Shorter, Papot, Bradley & Co. as evidence. The objection was overruled.

The complaint recites, that “the plaintiff claims of the defendants, a firm composed of John Gill Shorter, S. N. Papot, W. T. Walthour, and T. I. Perkins, who are the survivors and successors of Shorter, Bradley, Papot & Co., a firm composed of the said individuals and one Bradley, who has retired from the same, and who is not sued in this action, one hundred dollars, due from them by account,” &c. “Also, the further sum of one hundred dollars, for work and labor done for the defendants, at their request,” &c.

Technically, there is no succession in partnership, nor survivorship, except in case of the death of one or more of the partners. A successor is he that followeth or cometh in another’s place. A survivor is he that remaineth alive after others be dead.—Jacob’s Law Dict. At the common law, it was necessary to sue all the partners, notwithstanding each one was liable for the whole debt.—1 Chit. Pl. 42. The withdrawal of one member of a firm dissolves the partnership; and the continuance of the other members is the formation of a new partnership.

Section 2538 of the Revised Code, in authorizing any one of their associates or their legal representatives to be sued for the obligation of all, did not change the law of partnership, or alter the rule of pleading further than is simply expressed. The liability of such partner for the joint obligation of all was made enforceable at law. If a new firm,

though composed entirely of a portion of the members of an old firm, can be sued jointly in their firm name for the liabilities of the old firm, because each one is liable to pay them, then a service of the summons upon one only would authorize a judgment against all, to be satisfied out of their joint property. Besides, the second partnership is a new thing, though composed out of the old elements, and is not the promissor. The account received in evidence was not admissible to prove either the first or second count of the complaint.

The case was originally brought before a justice of the peace, and brought by appeal to the circuit court. It was tried after the day set for it, but before other cases which preceded it on the docket were reached, and it was left to the jury to determine whether the appeal was taken for delay.

There was no error in calling the case for trial at the time it was done.—Rev. Code, §§ 2660, 2772; *Womack v. Bookman*, 34 Ala. 38. The fifteen per cent. damages, authorized by section 2774 of the Revised Code to be assessed in cases of appeal from justices, when taken for delay merely, must be imposed by the court, and not by the jury. If it were assigned to the jury, the intention of the appellant would govern their finding, whereas the true question is, the reasonable ground of the appeal, in law, without particular reference to the intention.

The judgment is reversed, and the cause remanded.

BOOKER *vs.* ADKINS.

[ACTION ON PROMISSORY NOTE.]

1. *Opinion of witness; what question as to process of arriving at, may be properly disallowed.*—A witness called without objection, to prove the value of the hire of certain slaves in 1863 in lawful money, from facts in evidence, and his general knowledge of such matters, after stating his estimate, was asked, on cross-examination, how he arrived at his opinion. The court sustained an objection to the question,—*Held*, not error, because the question was too indefinite.
2. *Bankruptcy of party after appeal to supreme court; when not sufficient ground to set aside judgment.*—If a party becomes bankrupt after the submission of a cause in the supreme court, the judgment will not be set aside, but will be rendered as of the date of the submission.
3. *Same; what not sufficient evidence of bankruptcy, &c.*—A mere suggestion, on information and belief, by the appellant, that the appellee has become bankrupt since the appeal, but before judgment rendered in this court affirming the judgment of the court below, will not authorize any action by the supreme court.

APPEAL from the Circuit Court of Perry.

Tried before Hon. M. J. SAFFOLD.

This was an action by the appellee against the appellant on a promissory note given for the hire of slaves in 1863. There was a verdict and judgment for the plaintiff. The point upon which the case turns is fully set out in the opinion. The appellant assigns error upon two other matters, but as there seems to have been no exception reserved as to the matters complained of, it is unnecessary to refer further to them.

BROOKS, HARALSON & ROY, for appellant.

MORGAN, BRAGG & THORINGTON, *contra*.

B. F. SAFFOLD, J.—The consideration of the note sued on was the hire of slaves for the year 1863.

The description of the slaves, and the character of the labor performed by them during that year, having been

sufficiently ascertained by other testimony, Richard H. Lee was examined by the plaintiff, without objection, touching the value of their services in lawful money. He estimated it at \$400; but said they would not have hired for anything in United States currency at that time. There was none then in circulation in the country. On cross-examination, he was asked how he arrived at his opinion, but the plaintiff objecting to the question, the court refused to allow him to answer. This ruling is assigned as error.

The question was too indefinite. It called for every fact in the knowledge of the witness, and every process of his mind, relating to the matter. His competency to testify was not objected to by the defendant. Nor was it objected that sufficient facts upon which he might form a correct opinion were not given in evidence.

The action of the court on the questions to which the first and second assignments of error refer, does not seem to have been excepted to on the trial.

The judgment is affirmed.

NOTE BY REPORTER.—After the rendition of the judgment of affirmance in this case, and on a succeeding day of the term, appellant moved to set aside the judgment rendered by this court, on the ground that the appellee, since the appeal, but before the rendition of judgment, had become a bankrupt. It is not clear from the motion, whether the bankruptcy occurred before or after the submission of the cause, and the bankruptcy was suggested on information and belief. The opinion of the court overruling the motion was delivered by

SAFFOLD, J.—The appellant alleges the bankruptcy of the appellee, on information and belief only. This is not such evidence of the fact of his bankruptcy as will justify any action of this court in the matter.

If the bankruptcy occurred after the submission of the cause, the judgment would not be set aside, but would be rendered as of the date of the submission.

The motion is denied.

WALLER, ADM'R, *vs.* NELSON, ADM'R.

[ACTION ON PROMISSORY NOTE—REVIVOR, &C.]

1. *Claim; what not such as required to be presented within nine months of declaration of insolvency, &c.*—A promissory note, upon which a suit is pending at the time an estate is declared insolvent, is not such a claim as is required to be verified by affidavit and filed against such estate within nine months after the declaration of insolvency. Such suit, on revival, may proceed to judgment, and the judgment may be certified and filed as required by the statute. An objection by plea in abatement for a failure to file such note before judgment, is not sufficient to abate the suit.
2. *Revival of suit; within what time may be made.*—A motion to revive a suit pending in court, after the death of the plaintiff or defendant, comes in time, if made within eighteen months after the death of the plaintiff or defendant, or within eighteen months after the death or removal of the personal representative, when the first representative died before revival in his name. The mere *suggestion* of the death of the deceased party upon the record is sufficient motion for this purpose, in order to remove the bar of the statute.—Rev. Code, § 2542; 35 Ala. 79.

APPEAL from the Circuit Court of Dallas.
Tried before Hon. M. J. SAFFOLD.

The opinion states the case.

ALEX. WHITE, for appellant.
PETTUS & DAWSON, *contra*.

PETERS, J.—This is an action of debt, founded on a promissory note for \$2,205. It was commenced by Thomas J. Portis, as administrator of the estate of Albert Waller, deceased, on March 31st, 1866, against George L. Brotherton and James C. Taylor. The summons purports to have been executed on both of the defendants, on April 2d, 1866. But the complaint was afterwards amended, and the name of Brotherton was stricken out, without objection; and the cause was permitted to proceed without him. There was a bill of exceptions; and the record and the bill

Waller, Adm'r, v. Nelson, Adm'r.

of exceptions show, that Taylor died in September, 1866, and that his death was regularly *suggested* to the court on September 19th, 1867; and upon motion of the plaintiff, it was ordered that *scire facias* issue to George M. Hamner, his administrator, to come into court and make himself a party defendant to the suit. It does not appear that Hamner was served with *scire facias*, or had any notice. Hamner was appointed administrator of Taylor's estate on October 9th, 1867. At the March term of the court below, in the year 1868, the cause "was continued by operation of law." In 1869, on the 16th day of March, the resignation of Portis is suggested to the court, and "leave was granted to revive the suit in the name of the successor of said Portis in said administration." At the same time, the death of Hamner, the administrator of the estate of Taylor, is suggested and proved, and the cause again continued. After this, on the first day of October, 1869, the suit was revived in the name of Creswell A. C. Waller, as the administrator *de bonis non* of the estate of said Albert Waller. Taylor's death was then again suggested, and a motion was made to revive the suit against Richard M. Nelson, who had been appointed the successor of Hamner as administrator of Taylor's estate. Hamner had died on the 19th June, 1868, and Nelson had been appointed his successor on the 20th October, 1868. It also appeared, that Taylor's estate had been declared insolvent on Hamner's application, on the 16th day of June, 1868; and that the claim involved in this suit had never been filed in the probate court against the estate of Taylor so declared insolvent as above said. On the motion against Nelson, he appeared in court and objected to its allowance. Thereupon, the suit was ordered by the court to abate, and judgment was rendered against the plaintiff for costs. From this judgment the plaintiff below appeals, and assigns the judgment below as error.

The claim in controversy in this case is a promissory note. A suit on such a contract survives on the death of either of the parties, whether plaintiff or defendant.—*Net-*

ties, *Adm'r, v. Barnett*, 8 Por. 181; *S. C.*, Smith Cond. 235; Rev. Code, § 2555. And if an action at law is pending on such a claim when the estate of the deceased debtor is declared insolvent, it is not required to be filed and verified, within nine months from the declaration of insolvency, as is the case with claims not in suit, in order to maintain its validity against the estate of the insolvent.—*Richardson v. Tanner*, Adm'r, January term, 1872. Such a suit may proceed to judgment, on its proper revival, in the name of the representative of the deceased.—Rev. Code, § 2242; *Erwin et al., Ex'rs, v. McGuire et al., Adm'rs*, 44 Ala. 499. Objection for this cause would not then be a sufficient ground to abate the suit. This is the only ground set out in the judgment of abatement, as shown by its record. But the bill of exceptions shows also another ground. And in such a case, the bill of exceptions must govern the recitals of the judgment.—*Landreth v. Landreth*, 9 Ala. 430. The other ground seems to be the failure to make the motion to revive the said suit after the death of Taylor, within the time limited by law. The statute which imposes this limitation is in these words: "No action abates by the death or other disability of the plaintiff or defendant, if the cause of action survive or continue; but the same must, *on motion within eighteen months thereafter*, be revived in the name of, or against the legal representative of the deceased, his successor or party in interest, or the death of such party may be *suggested* upon the record, and the action proceed in the name of or against the survivor."—Revised Code, § 2542; *Rupert & Cassity v. Elston's Ex'r*, 35 Ala. 79. It is obvious from the reading of this statute, that there may be two or more dates from which the limitation of the eighteen months is to be reckoned. One is the death of the original defendant, who dies after the commencement of the suit; the other is the death, removal or resignation of the representative of such original defendant, or his successor. The time of the limitation is not to be always reckoned from the death of the original defendant; because, if this were so, there could be no revival in the name of the suc-

cessor of his representative, after eighteen months from his death. This is evidently neither the language nor the purpose of the Code. For, the revival may be in the name of the representative, or his successor, or party in interest, without regard to the length of time after the death of the original party, if the first revival was attempted with the proper dispatch. That is, if the *motion* was made within the proper time, as to the first representative. Here this was done. Taylor died in September, 1866, and the *suggestion* of his death and motion for *scire facias* against Hamner was made on the 19th day of September "thereafter;" that is, in 1867. This was within eighteen months, at least, after the death of Taylor. Hamner died before the revival against him. His death terminated the proceedings against him. The proceeding against Hamner continued the cause in court, and saved it from abatement during his life. Hamner died on the 19th day of June, 1868, and Nelson succeeded him on the 20th day of October following, and the motion to revive the action against Nelson was made on the first day of October, 1869. This was within one year and one month and a half after the death of Hamner. According to the above construction of the statute, this was within the proper time. There was, then, no lapse of eighteen months between the death of one defendant and the proceeding to revive against the representative or successor of such defendant. The motion against Nelson should have been allowed. The judgment of the court below was, therefore, erroneous. It is also proper to remark, that it does not appear that the judgment of the court below was rendered "in the name of the officers of the court." This is required by the Code. This requirement is not merely directory, but it is a positive command of the sovereign power.—Revised Code, § 2794. It is error to disregard it.

Let the judgment of the court below be reversed, and the cause remanded for further proceedings in the court below, in conformity with this opinion.

PAYNE *vs.* THOMPSON.

[SUPERSEDEAS, &C.]

1. *Supersedeas; by what court issued and where returnable.*—A proceeding by *supersedeas* is in the nature of an *audita querela*, and, as such, should be granted out of the court where the record, upon which it is founded, remains, or be returnable in the same court.
2. *Execution from probate court against sureties of administrator; when necessary to authorize issue of.*—An execution from the probate court is improperly issued against the sureties of an administrator, without a return of “no property” against the administrator, made to a regular term.
3. *Same; rule where sheriff is ex-officio administrator.*—The sheriff’s official bond becomes an administration bond when the administration of an estate is committed to him *ex-officio*, and his sureties are liable to an execution for his default, without a previous suit on the bond, as other sureties of administrators.

APPEAL from the Circuit Court of Butler.

Tried before Hon. P. O. HARPER.

The facts are stated in the opinion.

JUDGE & HOLTZCLAW, for appellant.

HERBERT & BUELL, *contra*.

B. F. SAFFOLD, J.—An execution having issued out of the probate court against the appellant, as surety of Perryman, in his administration of the estate of James Thompson, he applied to the judge of the Circuit Court for a *supersedeas* returnable into the circuit court. The judge granted the writ, and also a *certiorari* commanding the probate judge to send up to the circuit court all matters of record touching the issue of the execution, “that said circuit court may determine what of right ought to be done in the premises.” A transcript was sent up showing a revivor, on the 13th of March, 1871, of a judgment previously rendered against Perryman, as administrator, in favor of the appellee; the issue of an execution against the

said administrator, on the same day, returnable on the 2d Monday in July, 1871; and the issue of another execution against the administrator and his sureties, on the 17th of March, 1871, returnable at the same time as the other. This latter is the one superseded. The circuit court dismissed the petition. The appeal is taken from this action.

No revision of the judgment of revivor was sought, but only the quashing of the execution. A formal proceeding by *supersedeas* is in the nature of an *audita querela*. As such, it should be granted out of the court where the record, upon which it is founded, remains, or be returnable in the same court. It can not be granted out of any court returnable in the same court, where the record upon which it is returnable is not there. If the record be not brought into the court where the writ is sued, there shall be judgment against the plaintiff.—Comyn's Digest, *Aud. Quer.* (E. 2.)

The probate court must be held to have authority, under its general powers, to supersede its own execution in a proper case, especially when it has general jurisdiction of the subject. Whether the judge has authority to issue the writ of *supersedeas* is not so clear, but no harm can result from so construing his powers in application to executions proceeding from his court. The circuit judge had jurisdiction to grant the writ returnable into the probate court. But he could not make it returnable into his court, unless under some other process the record was to be brought there. The *certiorari* did not carry it there, in this instance, because no review of the judgment upon which the execution issued was asked or granted, and the inquiry was consequently confined to matters subsequent to that judgment.—*Marshall v. Candler*, 21 Ala. 490. The case was improperly in the circuit court, and there was no error in dismissing it.

The execution was subject to a *supersedeas*. It was not proper to issue one against the sureties until after a return of "no property" against the administrator, made to a regular term.—Rev. Code, § 2281.

The administrator became such by virtue of his office of sheriff. The administration attached to the office, and the official oath and bond of the officer were the security for his faithful administration.—Rev. Code, § 2010. Ordinarily, for any default of the sheriff, a suit on his bond is necessary to reach his sureties. But has not the legislature made it otherwise in cases of the administration of estates committed to him? It did so by express enactment before the Code, notwithstanding the administration was, as now, attached to the office, and not to the person.—Clay's Dig. pp. 222-3, § 10. It is true, the sheriff can not refuse the position without also resigning his office. But he accepts the office with the understanding that he is to perform all of its duties; and with a like understanding do his sureties become responsible for him. *Ragland v. Calhoun's Adm'r*, (36 Ala. 606,) and *Glover v. Gantt*, (1 Stew. 388,) are to the effect that in such cases, sheriffs are liable on their official bonds, to the same extent and in the same manner as other administrators, and the former declares, as a conceded proposition, that a judgment final against the administrator, is equally as conclusive against his sureties. This being so, section 2281 of the Revised Code authorizes an execution against the sureties without previous suit on the bond.

The judgment is affirmed.

RYALL vs. MAIX & CO.

[MOTION TO DISMISS APPEAL.]

1. *Appeal; when will not be dismissed.*—An appeal regularly and properly taken from a final judgment will not be dismissed, because a bill of exceptions contained in the record does not appear to have been signed in term time, nor in ten days after adjournment of court in pursuance of written agreement of counsel.

This was a motion to dismiss the appeal in this case. The grounds of the motion are fully set forth in the opinion denying the motion.

J. T. JONES, for motion.

EUGENE McCAA, *contra*.

PETERS, J.—This is a motion to dismiss the appeal taken in this case, because it does not appear that the bill of exceptions was signed by the presiding judge before the adjournment of the court at which the exceptions were taken, nor in ten days afterwards by consent of counsel in writing.—Rev. Code, § 2760. Such a defect in the record does not vitiate the appeal, when it appears that there has been a final judgment in the case in the court below, and that the appeal has been otherwise regularly taken, as is the case here.—Rev. Code, §§ 3485, 3488, 4420, 4421.

The motion is denied, with costs.

COX *vs.* HARRIS.

[ACTION AGAINST INDIVIDUAL MEMBER OF FIRM, FOUNDED ON JUDGMENT
AGAINST THE FIRM IN ITS FIRM NAME ONLY.].

1. *Partner; how may be sued to enforce firm liability.*—A judgment against a partnership in its firm name alone, will support an action against an individual member of the firm to enforce his individual liability for the firm debts.
2. *Same.*—The individual liability of each partner for the debts of the firm is not so merged by a judgment against the firm in its firm name only, as to prevent a suit on such judgment against an individual member of the firm to enforce his liability to pay its debts. Judgments, under the provisions of section 2559 of the Revised Code, are in law joint as well as several.

APPEAL from the Circuit Court of Macon.

Tried before Hon. LITTLEBERRY STRANGE.

The appellee prosecuted to judgment a suit against the firm of Herrin, Marquis & Co. The names of the individual partners were not given, but the firm was sued merely as a firm, and judgment was rendered against the firm merely.

After the recovery of this judgment, it not having been paid, the appellee brought suit on it against the appellant Cox, who was a member of said firm, and recovered judgment against him before a justice of the peace. Cox appealed to the circuit court, where, on a trial *de novo*, judgment was again rendered against him. Cox appeals, and insists in this court, that his individual liability as a member of the firm could not be enforced by suit against him on a judgment rendered against the firm.

GRAHAM & ABERCROMBIE, for appellant.

LIGON & COBB, *contra*.

PETERS, J.—The judgment against the firm in its firm name alone bound only the “joint property of all the associates.”—Rev. Code, § 2538. Yet there can be no doubt that each partner is individually liable for the debts of the firm.—*Waldron, Isley & Co. v. Simmons*, 28 Ala. 620; *Coll-yer on Part.* (Perkins’ ed.) p. 348, *et seq.*; *Thomas v. Hearn et al.*, 2 Porter. The mere reduction of a claim against a partnership sued in their firm name is not a payment or satisfaction of the claim. It is simply merged in the judgment, and this judgment becomes the foundation of a new suit. It is perfectly certain that a judgment is a proper cause of action in an independent suit.—3 Bouv. Law Dic. “*Merger*,” p. 175; 2 Black. Com. p. 465, (marg.); 1 Chit. Pl. pp. 111, 112, (marg.) It may be objected, that the first judgment against the firm of Herrin, Marquis & Co. is joint, and not several. This was so at common law, but it is changed by our statute. This makes “judgments” “joint

Jones et al. v. Black et al.

and several."—Revised Code, § 2539. Then this objection, had it been properly interposed in the court below, is of no avail.

Let the judgment be affirmed, with costs.

JONES ET AL. *vs.* BLACK ET AL.

[APPEAL FROM ORDER REFUSING TO DISSOLVE INJUNCTION RESTRAINING THE
HOLDING OF AN ELECTION, &C.]

1. *Act of legislature; when will not be declared unconstitutional.*—A statute will not be declared unconstitutional on the application of a mere volunteer, or person whose rights it does not specially affect. This will only be done in a proper case where some person seeks to resist the operations of the statute, and calls in the judicial power to pronounce it void as to him, his property or his rights.
2. *Election, holding of; when will not be enjoined on bill filed by individual electors.*—The holding of an election will not be enjoined, upon the allegation that the act under which it is to be held is unconstitutional, on a bill filed by individual electors in their own names, they not showing any injury or damage to themselves in person, property or rights.

APPEAL from the Chancery Court of Bullock.

Heard before Hon. B. B. McCRAW.

On the 27th day of January, 1872, the general assembly of Alabama passed "An act to establish a criminal court for the county of Bullock, with criminal and civil jurisdiction." This act provides, among other things, that an election for judge of said court should be held by the sheriff on the first Tuesday after the first Monday in June, 1872, in the same manner that elections are held for judges of the circuit court. The manner in which the election shall be conducted, or the law under which it was to be held, were not otherwise provided.

On the 26th of February, 1872, the general assembly

passed "An act to regulate elections in the State of Alabama," which repeals the "act to regulate elections in this State," approved October 8th, 1868, and all laws and parts of laws in conflict with the act of 26th February, 1872, except as to pending contests of election, under the act of 1868.

At the time of the filing of the bill in the present case, the appellants, Jones, Glover and Smith, had been regularly appointed and qualified inspectors of precinct four, in Bullock county, to hold the election for judge of the criminal court, and had advertised that said election would be held under the provisions of said "act to regulate elections in the State of Alabama," approved February 26th, and, as the bill alleged, would hold the election under that act, unless restrained, &c.

The appellees, N. H. Black, J. T. Kinchen and T. H. Harvey, who described themselves as "resident male citizens of the county of Bullock, and State of Alabama, over twenty-one years of age, and qualified electors thereof," file their bill, making said inspectors parties defendant, and praying that they be enjoined from holding said election, under the provisions of the act of February 26th, 1872, or under any other law than the election law of October, 1868.

The equity of the bill is made to rest solely on the allegation that the "act to regulate elections in the State of Alabama," approved February 26th, 1872, is unconstitutional and void, and therefore does not repeal the act to regulate elections, approved October 8th, 1868. The bill alleges, that the enrolled bill, signed by the president of the senate and speaker of the house, and approved by the governor, never passed both houses of the general assembly, and did not go through the forms required by the constitution to give it validity as a law; that certain important and material amendments, made in the senate, were omitted from the enrolled bill signed by the presiding officers of the two houses and by the governor. The bill sets forth with particularity the various objections to the bill, and also gives the omitted amendments. The matters relied

on to establish its invalidity are the same as those urged against the "act to regulate elections in the State of Alabama," approved February 26th, 1872, in the case of *Moody v. The State*, (reported on page 115 of this volume,) wherein said act was declared unconstitutional at a day subsequent to the decision in the present case. As these objections are there set forth in full, it is unnecessary to state them more particularly than has already been done in the present case.

The appellees having obtained a *fiat* for injunction from a chancellor, and having given bond, &c., an injunction issued as prayed for.

The defendants answered the bill, and admitted all its allegations, save as to the omitted amendments and other matters set up as a reason why the act of February 26th, 1872, should be held invalid, and insisted that said act was a valid law. They also demurred to the bill, on the ground that it showed that said act of the 26th of February, 1872, was a valid law, and repealed the act of October 18th, 1868.

A motion was made in vacation before the chancellor to dissolve the injunction. Neither the motion or the grounds upon which it was based are set out in the record. The chancellor overruled the motion, and hence this appeal.

C. L. J. CUNNINGHAM, for appellants.

RICE, CHILTON & JONES, *contra*.

PECK, C. J.—The power of the courts to declare an act of the legislature unconstitutional and void, is too well established at the present day to be doubted; but it is a highly responsible and delicate power, and never to be exercised, unless the exigencies of the particular case require it. While the courts can not, and ought not to shun or avoid the discussion of constitutional questions, when fairly presented, they will not, and should not, go out of their way to find such topics. They will not seek to draw in such weighty matters on trivial occasions; neither will they, as a general rule, pass upon a constitutional question and decide a statute to be invalid, unless a decision upon the

very point becomes necessary to the determination of the particular case. It is both more proper, and more respectful to a co-ordinate independent department of the government, to discuss constitutional questions only when that is the very *lis mota*; when the particular case in hand can only be disposed of by deciding the constitutional question.—Cooley's Con. Lim. 160, 163-4, and the cases cited.

Nor will a court listen to an objection made to the constitutionality of an act of the legislature by a party whose rights it does not specially effect. An act of the legislature will be assumed to be valid, until some one complains whose rights it invades; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, *as to him, his property or his rights*, that the objection of constitutionality can be presented and sustained.—Cooley, page 164; *Dejarnette v. Haynes*, 23 Miss. 600; *Dorman v. The State*, 34 Ala. 216, 249, and the cases cited.

A party who seeks to have an act of the legislature declared unconstitutional, must not only show that he is, or will be injured by it, but he must also show how and in what respect he is or will be injured and prejudiced by it. Injury will not be presumed; it must be shown.—The cases *supra*.

The complainants in their bill state, that they are resident male citizens of the county of Bullock, and State of Alabama, over the age of twenty-one years, and duly qualified electors in and for said county and state; but they do not state how or in what manner they are or will be injured or prejudiced at all, *either in their persons, their property or their rights*, by the election of a judge of the criminal court of the said county of Bullock, under what they call a pretended election law, purporting to have been passed by the legislature of Alabama, and to have been approved by the governor of Alabama on the 26th day of February, 1872, entitled "An act to regulate elections in the State of Alabama," contained in the printed acts of the legislature of Alabama for the years 1871-72.

For aught that appears in complainants' bill, they are mere volunteers, and therefore have no right to invoke the extraordinary powers of a court of chancery, in a matter in which they have no interest not common to all the people of the county of Bullock, if not common to all the people of the State of Alabama. As well might a party file his bill to prevent or restrain a public nuisance, without showing any personal individual injury to himself. In case of public nuisances, courts of equity have undoubted jurisdiction, and will interfere upon the information of the attorney-general, or upon the application of private parties directly affected by the nuisance.—2 Story's Eq. § 924; *The State v. The Mayor and Aldermen of Mobile*, 5 Porter, 279; *Roper v. Randolph*, 7 Por. 283; *The Mayor and Council of Columbus v. Rogers et al.*, 10 Ala. 37.

I have found no case, and none has been cited, where individuals have been permitted to invoke the aid of a court of chancery in a case like the present. The counsel for the complainants have referred to the cases of *Osborn et al. v. The President, Directors and Company of the Bank of the United States*, (9 Wheat. 738,) and *The City Council of Montgomery*, (39 Ala. 162.) I have examined these cases, and feel constrained to say they fail to sustain the bill of complaint in this case. In each of these cases, the bill clearly disclosed an interest and an injury to the complainants, and particularly in what the alleged injury consisted.

It is the unanimous opinion of the court that the injunction in this case was unadvisedly granted, and should have been dissolved on the motion of the defendants; and this court, proceeding to render such decree in the premises as should have been rendered by the chancellor in this behalf, do order, adjudge and decree, that the injunction heretofore granted in this case be, and the same is, hereby dissolved. It is further ordered, adjudged and decreed, that the appellees pay the costs of this appeal in this court, and in the chancery court.

DUMAS, TRUSTEE, *vs.* ROBBINS.

[ACTION ON PROMISSORY NOTE—REVIVOR, &C.]

1. *Trustee of express trust, suit by; when does not abate, and how may be revived.*—Where the trustee of an express trust commences an action on a promissory note belonging to the trust estate, and resigns, the action is not thereby abated, but may be revived in the name of his successor, and if, after an order is made reviving the suit in the name of such successor, the court, on defendant's motion, strikes the case from the docket, and renders a judgment against the plaintiff for the costs, on appeal the judgment will be reversed, and the cause remanded for further proceedings, &c.

APPEAL from the Circuit Court of Wilcox.

Tried before Hon. P. O. HARPER.

This action was brought on the 7th of March, 1869, by Wm. A. Kimbrough, who describes himself "as trustee of the estates" of H. C., C. M., M. F., C. F. and L. A. Dumas, minors, against one Shipley and Josiah Robbins, to recover the amount of a promissory note made by them payable to Joel Dumas, which note it is alleged is now the property of plaintiff, "as such trustee." Service was effected on Robbins, and a return made of not found as to Shipley.

At the spring term, 1869, the resignation of the plaintiff as trustee was suggested, and a *scire facias* ordered to issue to Clement M. Dumas, as trustee, and the cause continued. At the fall term, 1869, as it appears from the record, the resignation, settlement and discharge of W. A. Kimbrough, as trustee, was suggested, and the appointment and qualification of C. M. Dumas as trustee in his stead, and motion made to continue the suit in the name of said Dumas, as trustee, &c., as party plaintiff. On the hearing of this motion, an agreed state of facts was offered in evidence, the substance of which was, that the trust in question was created by the will of James Dumas, deceased; that Joel Dumas, the trustee appointed by the will, entered upon the

discharge of the duties of his trust, and died without settling it; that afterwards Joel's administrator settled the trust, so far as executed by Joel, in the chancery court, with Kimbrough, plaintiff in this suit, who had been duly appointed and qualified as trustee, instead of Joel, and had turned over to Kimbrough the assets of the trust estate, among which was the note in suit; that after Kimbrough brought the suit, he in turn resigned, settled his trust in the chancery court, and was discharged, turning over the assets to his successor, Clement Dumas, who had been duly appointed and qualified as trustee; that the trust estate consisted wholly of personalty, and that eighteen months had not elapsed since the resignation of Kimbrough.

The will of James Dumas, which had been duly probated, &c., was introduced in evidence, which showed that the trust created by it was an express trust, for the benefit of the minors mentioned in the complaint.

The court granted the motion, and ordered that Clement Dumas be made party plaintiff, and that the suit proceed in his name, &c., the defendant excepted to this ruling of the court, and a bill of exceptions containing the foregoing statement of facts was signed and sealed, at his instance, by the presiding judge, and filed in court November 9th, 1869.

The record shows no further proceedings in the case until the spring term, 1871, and when it was discontinued as to Shipley, who had not been served, and then, on motion of the defendant, the case was stricken from the docket, and the plaintiff taxed with the costs. To this action of the court the plaintiff excepted, and at his instance a bill of exceptions was signed and sealed by the pending judge, in which it is stated that no evidence was offered in support of the motion.

At a subsequent day of the term, Dumas placed a motion on the docket to set aside the order of dismissal, and to reinstate the cause. The court overruled this motion, and the plaintiff excepted, and reserved a bill of exceptions, which shows that on the hearing of this motion, the

same evidence was introduced as on the hearing of the motion to make Dumas party plaintiff.

The judgment of the court dismissing the cause and taxing the plaintiff with costs, is now assigned for error.

The appellee did not join in error, but moved to dismiss the appeal. The grounds of this motion are fully stated in the opinion.

PETTUS & DAWSON, for appellant.

S. J. CUMMING, *contra*.

PECK, C. J.—1. The motion to dismiss the appeal must be overruled. The ground of said motion is, that the appellant had not been made a party plaintiff, as trustee, in the place and stead of William A. Kimbrough, in whose name, as trustee, the action was commenced. This is not sustained by the record. The record shows that said Kimbrough, the trustee, had resigned and made a final settlement in the chancery court, and that appellant had been duly appointed trustee in his place, and on his motion the court had ordered the suit to be continued and prosecuted in his name, as trustee and successor of said Kimbrough. This was done at the fall term of the court, 1869.

2. At the spring term, 1871, on the motion of the defendant Robbins, (the action having been discontinued as to the defendant Shipley, on whom the summons had been returned not executed,) the cause was stricken from the docket, and judgment rendered against the appellant, as plaintiff, for the costs. To this decision of the court the appellant excepted. The reason for this ruling of the court is not stated, but I presume it was, that the action abated by the resignation of said Kimbrough as trustee, and could not be revived in the name of appellant as his successor.

Section 2542 of the Revised Code enacts, that “no action abates by the death or *other disability* of the plaintiff or defendant, if the cause of action survive or continue; but the same must, on motion within eighteen months thereafter, be revived in the name of, or against the legal repre-

Dumas, Trustee, v. Robbins.

sentative of the deceased, *his successor or party in interest*; or, the death of such party may be suggested upon the record, and the cause proceed in the name of, or against the survivor." I understand the words "*other disability*," as here used, to refer to a disability that intervenes without the death of the party, whether plaintiff or defendant. So understood, they embrace the present case, for, by the resignation of said Kimbrough, as trustee, the suit could not be further prosecuted in his name; he thereby ceased to have any title to the note, the foundation of the action, and on the appointment of the appellant as his successor, the legal title vested in him, and unless the action could be revived in his name, it must, necessarily, have abated. It was the intention of the said section, as it seems to me, to prevent this, by authorizing the action to be revived in the name of appellant, as the successor of said Kimbrough. This interpretation harmonizes with the spirit of our legislation on this subject. Section 1593 of the Revised Code provides, that "upon the death of a sole or surviving trustee of an express trust, the trust estate does not descend to his heirs, or pass to his personal representatives." It would seem, then, necessarily to vest in his successor; and I can see no good reason why this should not be so, in case of a resignation.

Chapter 9, p. 652 of the Revised Code provides for the resignation and appointment of trustees of such trusts, and these provisions, I think, clearly contemplate that the succeeding trustee is to stand in the shoes of his predecessor, and if a suit be pending in his name, as trustee, either as plaintiff or defendant, it may be revived and prosecuted by or against his successor.

The several sections of the Revised Code above referred to are manifestly remedial provisions, and should be liberally construed. Believing the foregoing to be their true interpretation, it follows, the court below erred in sustaining the defendant's motion, and striking the said cause from the docket.

The judgment is reversed, and the cause is remanded for further proceedings, at the appellee's cost.

TURNER *vs.* THE STATE.

[INDICTMENT FOR ENTICING LABORER, &C., UNDER SECTION 3691 OF REVISED CODE.]

1. *Revised Code, section 3691 of; to what case does not apply.*—Section 3691 of the Revised Code, relative to enticing laborers, &c., does not apply to a case where the accused had a prior valid, though verbal, contract with the laborer, the term of which had not expired, and which the prosecutor enticed him to abandon.
2. *Secondary evidence of lost instrument required to be stamped; when admissible.*—Where a contract requires a United States revenue stamp, it may be affixed and cancelled by any of the parties. If this is not done at the date of its execution, the instrument can not be received in evidence, and though lost, secondary evidence of its contents can not be admitted. The omission must be supplied in the manner provided by the revenue law.

APPEAL from the Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

The opinion states the facts sufficiently.

J. A. CLENDENNIN, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

B. F. SAFFOLD, J.—The appellant was convicted under an indictment for enticing away a laborer, contrary to section 3691 of the Revised Code.

The court excluded testimony tending to show that at the time of the alleged misconduct of the defendant, there was an unfulfilled verbal, but valid, contract between him and the laborer, made prior to the latter's written agreement with the prosecutor. If this was so, could he commit the offense for which he was indicted, towards the prosecutor?

Blackstone says, retaining a man's hired servant before his time is expired is an ungentlemanlike, as it is an illegal act. That the inveigling or hiring his servant, which induces a breach of his contract, is an injury to the master

for which the law has given him a remedy by a special action on the case.—Vol. 3, p. 141. Except for our statute, the prosecutor would be the offender. The subsequent contract was undoubtedly an abandonment of the other by the laborer, and valid against all other persons than the defendant. Is the latter put to his action of damages? May he not regain his laborer, if he can do so in a peaceable and prudent manner? The statute has ample room, without subjecting to its operation the particular person against whom the violated contract is a tortious one; especially, as one-half of the fine is to go to the perpetrator. The court erred in rejecting the evidence.

The written contract alleged to have been broken was not stamped at the time of its execution, and for that reason was not receivable in evidence.—14 U. S. Stat. at large, pp. 143-4. Parol proof of its contents was inadmissible, notwithstanding its loss, because neither the original nor a copy was admissible without the stamp, and the secondary can not acquire a privilege which the best evidence did not have. This written contract was essential to the prosecution. If it be contended that the loss of the instrument prevented its defect from being remedied, it may be replied, that the practice would encourage pretended losses, and that the evidence which would prove its contents would establish a copy to which the proper stamps might be affixed according to the provisions of the revenue law.

The stamp might have been affixed and cancelled by either party.—U. S. Stat. *supra*.

It is unnecessary to consider the charges given and refused in detail. What has been said is decisive of them.

The judgment is reversed, and the cause remanded.

ADAMS *vs.* OLIVE ET AL.

[ACTION ON ATTACHMENT BOND.]

1. *Allowance of challenge to juror in civil case, after acceptance ; when not erroneous.*—The allowance of a challenge of a juror, before the jury is completed, to a party who has not exhausted his challenges, is not error, notwithstanding the party had hastily expressed himself satisfied with the juror challenged.
2. *Variance ; what is not, in suit on attachment bond.*—In a suit for damages brought on an attachment bond, the record of the proceedings in the attachment suit is not inadmissible on the ground of variance, because the defendant is sued as James Olive, and the record shows that the bond was signed by James A. Olive. A man can not have two christian names in law.
3. *Attachment bond, &c. ; how may be proved.*—While, in such a suit, the plaintiff may offer the original bond in evidence, he need not do so, otherwise than by introducing the final record of the attachment suit. The defendant, if he executed the bond, is precluded from disputing its existence or genuineness by the record.

APPEAL from the Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

The facts are sufficiently stated in the opinion.

PUGH & BAKER, SEALS & WOOD, and FOSTER, for appellant.

W. C. OATES, *contra*.

B. F. SAFFOLD, J.—The appeal is taken from a judgment of non-suit suffered by the plaintiff in consequence of the rulings of the court on questions of evidence chiefly.

The jury was not complete when the defendant's counsel claimed another challenge, stating that he had too hastily expressed himself satisfied with the jurors accepted by the plaintiff, and not objected to by him. He had not exhausted his challenges. There was no error in allowing the challenge. In a civil case, the permission of a peremptory challenge, though unauthorized, is not available on

error, if the cause was tried by an impartial jury.—*Tatum v. Young*, 1 Porter, 298; *Bibb, judge, &c., v. Reid & Hoyt*, 3 Ala. 88.

The suit was for the recovery of damages on an attachment bond, and was heard on the plea of the general issue, with leave to make any defense not requiring a sworn plea. The plaintiff, on the defendant's objection, was not permitted to give in evidence the record of the proceedings in the attachment suit. The only ground for this decision seems to have been that the attachment bond was executed by James A. Olive, as principal, and the suit is against James Olive. This difference of name does not constitute a variance between the pleadings and proof. A man can not have two christian names in law.—1 Tidd's Prac. m. p. 458; 1 Chit. Pl. 246; *Scott v. Soans*, 3 East, 111. The record was important evidence for the plaintiff in several respects, and ought to have been admitted. *Ansley v. Carlos*, (9 Ala. 973,) declares the correct rule governing the admission of the record, and of the papers, when the final record has not been made up.

The attachment bond was a written instrument, the foundation of the suit, purporting to be signed by the defendants, and the plaintiff was at liberty to introduce it in evidence, without proving its execution, under section 2682 of the Revised Code. But it was not necessary for him to offer it, otherwise than by the introduction of the record of the attachment suit, because the defendants, if they signed it, were estopped from requiring further evidence of its existence or genuineness, by the record of that suit, which had been conducted to a final issue.

The judgment is reversed, and the cause remanded.

NOTE BY REPORTER.—At a subsequent day of the term, the appellant applied for a rehearing. This application did not come into the Reporter's hands. The following response was made by

SAFFOLD, J.—The appellees desire a rehearing, on the ground that the court fell into error in supposing the de-

fendant, James Olive, and the maker of the attachment bond, James A. Olive, to have been the same person, whereas, they were different persons. It appears from the transcript that the plaintiff offered to prove their identity, when the court decided that such proof would not alter the case. The ruling of the court could only have been based on the supposed variance on account of the middle name. If the defendant Olive did not sign the bond, he ought to have cravedoyer of it, and pleaded *non est factum*.

A rehearing is denied.

BUCHANNAN vs. REESE.

[APPEAL FROM JUDGMENT ON NEW TRIAL GRANTED UNDER ORDINANCE NO. 39 OF 1867, AND REFUSAL OF COURT TO STRIKE CAUSE FROM DOCKET.]

1. *Motion to strike cause from docket and to set aside order granting new trial; when proper practice.*—At a rehearing of a cause, after new trial granted at a subsequent term of the court, under ordinance 39 of the convention of 1867, and the act of December 10th, 1868, extending it, it is a proper practice, when the grounds for granting a new trial were insufficient, to move to strike the cause from the docket and to set aside the order for a new trial.
2. *Same, when grant of new trial is vacated; party entitled to judgment of what date.*—The legislation referred to was special, and applied to peculiar circumstances, and the party is entitled to have his judgment of the date when he rightfully obtained it.

APPEAL from the Circuit Court of Russell.

Tried before HON. LITTLEBERRY STRANGE.

At the fall term of the circuit court in 1867, the appellant, Buchanan, recovered a judgment against the appellee on a promissory note. At a special term of the court in January, 1869, the said defendant moved for a new trial, under an act of the legislature, passed October 10th, 1868,

extending until the 26th of June, 1869, the operation of ordinance No. 39 of the convention. This ordinance authorized the granting of new trial in all cases where the judgment was rendered between the 11th of January, 1861, and the date of the ordinance, to-wit, December 6th, 1867, upon affidavit showing a meritorious defense, provided the application was made in twelve months from its passage. The court granted this motion for a new trial. The ground upon which it was based was, that the consideration of the note was the purchase of slaves.

The cause was then returned to the docket to be heard again. At the fall term, 1869, it was called for trial, when the plaintiff moved to strike it from the docket on the ground disclosed by the above facts. The motion was overruled. The plaintiff next moved the court to set aside the order granting a new trial, made at the special January term, 1869, for the same reasons as alleged in favor of the other motion. This motion was overruled. The trial was proceeded with, and judgment was rendered for the defendant, under a charge of the court, that the purchase of slaves (which was made before the 27th of October, 1859,) was not a sufficient consideration for the note to sustain the plaintiff's action. From this judgment the appeal is taken; and all the rulings, as recited above, are assigned as error.

MARTIN & HOOPER, for appellant.

MCDONALD & GUNN, *contra*.

B. F. SAFFOLD, J.—In *Ex parte Sims*, (44 Ala. 248,) it was held that the proper practice to dispose of the new trial, granted at the special term, would have been to apply to this court for a *mandamus* directing it to be set aside. It was not a final judgment, and was granted under peculiar circumstances, by authority of special legislation, but on insufficient grounds. It was thought that the party was entitled to have his judgment of the date when he rightfully obtained it, if he so desired.

We decide, on the authority of this case, and of *Mudd*

v. McElvain, (44 Ala. 48,) that there was error in the refusal of the court to strike this case from the docket, to set aside the order for a new trial made at the special January term, 1869, and in the charge of the court as stated above.

The judgment is reversed, and the cause remanded.

WHITFIELD ET AL. vs. CLARK ET AL.

[BILL IN EQUITY TO MARSHAL ASSETS, &C.]

1. *Deed of trust; when has preference over judgment, &c.*—A deed of trust for valuable consideration, duly recorded, supersedes a judgment previously rendered, but on which no execution had issued at the date of the deed after the lapse of a term.
2. *Execution; what destroys lien of.*—The lapse of a term destroys the lien obtained by an execution in the hands of the sheriff at the death of the defendant, and prevents the issue of a subsequent alias.
3. *Insolvent estate; claims against.*—Judgments rendered before a decree of insolvency of the debtor's estate must be filed in the probate court like other claims.
4. *Sale of land under execution; when will be enjoined at instance of mortgagee.* Equity will enjoin a sale of land under a judgment and execution to which it is not subject, at the suit of a mortgagee or trustee in a deed of trust.

APPEAL from the Chancery Court of Marengo.

Heard before Hon. A. W. DILLARD.

The facts are sufficiently stated in the opinion.

LYON & JONES and REAVIS, for appellant.

ROBT. H. SMITH, *contra*.

B. F. SAFFOLD, J.—The contest is between a judgment creditor and a creditor holding security by mortgage or deed of trust.

The appellee, Grant, having several judgments against

Jones, recovered November 26, 1858, on which execution was duly issued and levied on personal property, J. R. Bryan, as surety, executed with the said defendant Jones a forthcoming bond. This bond was forfeited on or before the first Monday of April, 1859. No further executions were issued until February 26th, 1861.

On the 28th of January, 1861, Bryan executed a deed of trust of his lands and some personal property to Gaines Whitfield, jr., to secure the payment of a promissory note for \$43,804 18, made by him in favor of Gaines Whitfield, sr., on the same day, and due January 1st, 1862. This note was made up of a large amount of money loaned at the time, a considerable sum loaned about the same time for which the security was promised, and other money loaned at a prior date without promise of this particular security. The deed was recorded March 9th, 1861.

Fi. fas. were issued on Grant's judgments February 26, 1861, and again October 4, 1861, but no more until July 2, 1866, when they were levied on the lands conveyed in the trust deed. Bryan died August 12, 1862.

The bill of the appellants, original and supplemental, seeks to enjoin Grant and the sheriff from selling the lands for the satisfaction of the executions, and to have the assets of the debtor marshaled. An amendment to the bill sets up, as additional ground for relief, that since the filing of the bill Bryan's estate has been declared insolvent, and that Grant's judgments were not filed as claims against it within the time required. The bill was filed September 1, 1866.

When the deed of trust was made, judgments were not themselves liens on property, and the law of executions was, that if an entire term elapsed before the return of an execution and the suing out of another, the lien created by the delivery of the first to the sheriff was lost.—Rev. Code, § 2873. The trust deed, so far as it secured debts created at the date thereof, was valid from its date, inasmuch as it was recorded within three months from that time.—Rev. Code, § 1557. It was also effectual for the security of those

previously contracted from the time of its recording.—Revised Code, § 1558. It therefore intervened and possessed the property, to the exclusion of Grant's judgments, at its date, for that portion of the debt created at the time of its execution. The entire term had then elapsed.

In respect to that part of the debt secured which was contracted previously, the trust deed would come in at the first hiatus in the execution lien. Such an opportunity occurred prior to July 2, 1866, when the execution levied on the lands was issued, because none other had issued since October, 1861, and no stay law or other impediment had prevented it.

The act of February 20, 1866, (Revised Code, § 2876,) created no lien of judgments, but only undertook to preserve any that existed. The act of Dec. 10, 1861, (Acts 1861, p. 33,) which is supposed to have done so, has been declared unconstitutional.—*Martin v. Hewitt*, 44 Ala. 418. There is a rather unintelligible ordinance, No. 47, of the convention of 1865, which seems to have aimed at conferring a partial and temporary privilege of lien in certain cases. A writ of execution, or other process requiring the sale of property, is to be returned by the sheriff endorsed "returned by operation of law," upon being paid the costs due the officers of court, and all of the defendant's property is to "stand for the payment of the debts due by the judgment in such writ or other process." This ordinance was to cease to be a law from the adjournment of the next session of the general assembly, but the lien created was not to be destroyed "so long as said writ or other process shall remain unsatisfied in whole or in part." If it had any validity at all, the lien was restricted to that stayed or returned execution or other process, because no other was to issue to preserve the lien acquired by that, and the legislature was to regulate the matter when it met.

The execution of July 2, 1866, was illegally issued. An alias execution can only issue after the death of the defendant, when there has not been the lapse of an entire

Jones v. Matthews.

term since the one which was in the hands of the sheriff when the defendant died.—Rev. Code, § 2875.

The requirement of section 2196 of the Revised Code, that all claims against an insolvent estate must be filed before nine months from the declaration of insolvency, applies to judgments rendered before such decree. So far, therefore, as Grant depends on legal remedies for the satisfaction of his judgments, they are barred by his failure to file them.—*Ray v. Thompson*, 43 Ala. 434.

The equity of the bill is settled by the case of *Martin v. Hewitt*, *supra*.

The decree is reversed, and a decree will be entered in this court perpetuating the injunction as prayed. The costs of this court and of the chancery court will be charged against the appellees.

JONES vs. MATTHEWS.

[MOTION TO SET ASIDE JUDGMENT OF AFFIRMANCE ON CERTIFICATE.]

1. *Judgment; when may be affirmed on certificate.*—In appeals to the supreme court, the statute requires that the transcript shall be filed within the three first days of the court to which the appeal is taken. If this is not done, the judgment may be affirmed on certificate.—Rev. Code, § 3499.
2. *Same; when may be set aside.*—And if such judgment is affirmed on certificate, the court may set the affirmance aside and reinstate the case, for good cause shown. But the motion for this purpose must be made during the term, and supported by affidavits showing satisfactory reasons why the transcript was not filed *within the three first days* after the call of the division to which the case belongs.—Rev. Code, p. 818, Rule 26.
3. *Same; when judgment of affirmance on certificate will not be set aside.*—If the affidavits submitted with the motion show that the transcript was made ready by the clerk of the court below, as early as the commencement of the term of this court to which the appeal is taken, and that the cause belongs to the third division, which by order of court was set to be called on Monday, the 5th day of February after the commencement of the court on the first Monday in January in the same year, and the

judgment of affirmance is taken on certificate, on the 10th day of said month of February,—then the failure to file the transcript, because the same was not sooner furnished by the clerk than the commencement of the term, is not a satisfactory reason to set the judgment of affirmance aside. Such delay is not a compliance with the rule of practice prescribed by this court.

Motion to set aside judgment of affirmance on certificate. The grounds of the motion are stated in the opinion.

BLAKELY & FERGUSON, *pro motion*.

RICE, CHILTON & JONES, *contra*.

PETERS, J.—This is a motion, supported by affidavit, to set aside a judgment of affirmance on certificate, rendered on the 10th day of February, 1872, and to reinstate the cause upon the docket.

The law clothing this court with the power to grant such a motion is in the following words: "If an appeal is taken, and the transcript of the record is not filed within the first three days of the court, it is the duty of the court, on motion of the appellee, to affirm the judgment or decree of the court below, upon the production by him of the certificate of the register, clerk, or judge of the probate court, that an appeal has been taken to the supreme court. For *good cause shown*, the court may reinstate the cause during the term, on payment of costs."—Rev. Code, § 3499. The cause sought to be restored in this case was allotted to the third division. This division came up in its regular course on Monday, the 5th day of February, 1872; but the judgment of affirmance was not taken until the 10th day of that month following; that is, it was not taken until after the call of that division. So much of the rule of this court prescribing the practice under the foregoing statute, which governs this case, is in the following language, to-wit: "In all other cases, where a motion is submitted to set aside a judgment rendered on certificate or citation, affidavits must be produced showing satisfactory reasons why the transcript was not filed within the first three days after the call of the division to which the case belongs."—Sup. Ct. Rules, Nos.

25 and 26, Rev. Code, p. 818. This application is on petition which is verified by the oath of the appellant. It was filed in this court on the first day of June, 1872. This was before the final adjournment of the last term, and was in time.—Rev. Code, § 3499, *supra*. The appellant's reason why the transcript was not filed within the three first days after the call of the third division, to which his case belonged, is that the clerk of the court below would not, or could not, prepare the transcript in time for that purpose. The evidence in support of this reason is not satisfactory. It appears, from the transcript filed with this application, that the judgment sought to be appealed from was rendered in the circuit court on the 8th day of June, in 1871, and that the appeal was taken on the 13th day of December thereafter. It is true, that the clerk's certificate to the transcript bears date the 1st day of December, 1871. But it is quite likely that this date is erroneous, as it contradicts the dates both of the notice of appeal, its service and the security for costs. These dates are respectively the 13th day of December, 1871. It is hardly to be presumed that these dates are wrong, or that the record was made and the transcript finished before these dates. Yet this is the purport of the certificate. But, say the transcript was ready by the 1st day of January, 1872, or even by the 1st day of February, 1872; this was in ample time to have filed the transcript "within the three first days after the call of the division" to which the case belonged. This view of the facts is sustained by the affidavit of the clerk. He affirms, that "before the commencement of said term" (the January term, 1871,) of this court, "he had prepared a complete transcript of the record in said cause, and had it ready for delivery, but neither the appellant or his counsel called for the same." This was in ample time, with at least a month to spare, for the filing of the transcript under the rule of practice above quoted. And, although I always feel a strong leaning to grant motions of this kind when made in time, it would be an utter disregard of the prac-

tice prescribed by this court to do so in this case, under the evidence submitted in the case.

The motion is, therefore, refused, with costs.

WATTS vs. CLEGG.

[ACTION ON THE CASE FOR DAMAGES, &c.]

1. *Indictment, original of; when admissible evidence.*—In an action of damages for causing the plaintiff to be indicted for perjury, the original indictment is receivable in evidence unless it appears that the final record has been completed.
2. *Same; how may be authenticated.*—It may be authenticated by the verbal testimony of the clerk.
3. *Judgment of acquittal; effect of.*—In such a case, the minute entry of the judgment of acquittal in the prosecution for perjury is not *res inter alios acta*.

APPEAL from the Circuit Court of Clay.

Tried before Hon. CHARLES PELHAM.

The facts are sufficiently stated in the opinion.

TAUL BRADFORD, for appellant.

L. E. PARSONS, *contra*.

B. F. SAFFOLD, J.—The appeal is from a judgment against the apellant, in an action of damages for causing the appellee to be indicted for perjury.

On the trial, the plaintiff was permitted to introduce the original indictment against him for perjury, and to prove by the clerk that it was a record of his court. Without proof that the final record of that prosecution was made up, the original papers were admissible.—*Buffington v. Cook*, 39 Ala. 64; *Calvert v. Marlowe*, 18 Ala. 67; *Barron v. Fort*, 18 Ala. 668. In *Carroll v. Pathkiller*, (3 Porter, 279,) the

clerk was not permitted to testify that a transcript which he had certified as complete, was not so, but that there were other proceedings omitted. The court said the proper way was to obtain a complete transcript. Of course, that is the rule when the final record has been made up. But how else can the papers from which the record is to be made up be verified before? The clerk is their custodian,—the court knows its own officers,—and his certificate to a transcript, with the seal of the court attached, is nothing more than his declaration under his official oath, authenticated in a particular way which is unnecessary in this case. *Baier v. Woodbury*, 1 Pick. 362.

The plaintiff was also permitted to read in evidence the minute entry of the judgment of acquittal in the case of his indictment for perjury. There was no error in this, for the reasons above stated, and, also, because it was evidence to establish the fact of his acquittal, notwithstanding the parties were not the same. In such a case, the record is not *res inter alios acta*.—1 Greenl. Ev. §§ 538, 527. The objections of the defendant to the above rulings of the court were general, not specifying any particular causes.

The judgment is affirmed.

HILL vs. SMITH ET AL.

[ACTION ON PROMISSORY NOTE—NON-SUIT.]

1. *Evidence, exclusion of; what presumption will be made as to rightfulness of.* The evidence must be confined to the issue or issues made on the trial; and when the record fails to show what issue was joined between the parties, it will not be presumed that there was an issue which forbid the exclusion of testimony apparently irrelevant.
2. *Charges of court; what presumptions will be indulged in to uphold.*—The charges of the court must be confined to the issues and the evidence before the jury on the trial; and where the record fails to show what the

issues were, and all the testimony is set out in the bill of exceptions, this court will not presume that there was not an issue to which the charges were applicable, if the evidence tends to support the charges, when the appellant comes here to set aside a non-suit taken in the court below.

APPEAL from the Circuit Court of Marengo.

Tried before Hon. L. R. SMITH.

The opinion states the case.

WALLER & PITTMAN, for appellant.

J. T. JONES, *contra*.

PETERS, J.—The transcript of the record does not show upon what plea or pleas the parties went to trial in the court below. The judgment recites: "This day came the parties, by their attorneys, and also came a jury of good and lawful men, who being duly sworn well and truly to try the issue joined between the parties, upon their oaths do say, they find said issue in favor of the defendants." Upon this verdict judgment was entered for the defendants for costs against the plaintiff. It appears that there was a bill of exceptions taken by the plaintiff on the trial. From this, it is shown that the plaintiff "took a non-suit" in the court below. But it no where appears what plea or pleas were interposed by the defendants. The suit is founded upon a promissory note in the following words:

"2,955.

Demopolis, February 10, 1863.

"Twelve months after date we promise to pay, with interest from date, to the order of Susan Hill, administratrix, or order, twenty-nine hundred and fifty-five dollars, value received. Negotiable and payable at Greensboro Insurance Company.

(Signed)

"JOHN W. SMITH,

"JOHN DAUGHDRILL,

"ALF. BREITLING."

This note was indorsed by Susan Hill, and the plaintiff, F. F. Hill, avers in his complaint that he "is the legal

owner of the same." The plaintiff read the note to the jury, and "rested his case." The defendants then offered evidence tending to show that this note was given for two slaves "purchased from Susan Hill, as administratrix, at public auction, said property having been sold under an order of court on the day the note bears date, in Demopolis, Marengo county, Alabama." It was also shown, without objection, that at the time of said sale said slaves "had no market value in lawful money of the United States." The plaintiff then attempted to show, by evidence, what was "the relative value of Confederate money and gold coin of the United States, and at what rates it could be exchanged therefor." This evidence, on objection of the defendants, the court rejected, and plaintiffs excepted. The ages of the slaves were proven; and the bill of exceptions recites, that this was "all the evidence before the court." But I have stated the testimony more in substance than in detail. Upon this evidence, the court charged the jury—

"1. That if they believed the plaintiff had proven what was the market value of the slaves, which were the consideration of the note sued on, in lawful money of the United States, they should find for the plaintiff, and assess the damages at the amount so found to have been their value in lawful money of the United States.

"2. That if the jury believed that the plaintiff had failed to prove what was the market value of said slaves in lawful money, or failed to prove that said slaves had any market value in lawful money of the United States at the date of said note, then they should find for the defendants."

These charges were excepted to by the plaintiff. The plaintiff then moved the court to give two charges, the first of which was as follows: "1. That if the jury believed the evidence, they should find for the plaintiff and assess the damages at the amount of the principal of said note, with interest thereon." This was refused, and the plaintiff again excepted. The other charge moved for by the plaintiff was abstract. There was no evidence before the jury that the

note was to be paid in Confederate money. It is, therefore, omitted.

A cause brought to this court must be disposed of here as it is made upon the record.

The relevancy or the irrelevancy of the evidence must depend upon the issue to be proven. This issue depends upon the answer made in the plea to the complaint, or the facts presented in the replication to the plea. Here, there is no plea set out in the record. It can not be said that the value of the Confederate money had anything to do with the case. It is unknown whether there was any issue involving such an inquiry or not. It is not to be presumed, against the judgment of the court, that there was such an issue made on the trial below. If, then, the evidence on this question was kept from the jury by the court, the record does not show that there was any issue which necessarily rendered such evidence relevant. It follows, therefore, that there was no error committed in excluding it.—1 *Phill. Ev.* (C. & H. and E.'s Notes,) pp. 732-3-4, (4 Am. ed., 1859.)

For a like reason, it can not be said that the charges of the court were wrong. For aught that appears from the record, there may have been an issue to which they were applicable. They did not transcend a possible state of facts which the evidence before the jury tended to prove. The consideration mentioned in the note is not conclusive. It may be impeached. It may appear to be valuable, yet it may turn out to be wholly worthless. In such case, the contract falls with it.—*Rev. Code*, § 2632; *Newton v. Jackson*, 23 Ala. 335; *Holt v. Robinson*, 21 Ala. 106; *Corbin v. Sistrunk*, 19 Ala. 203; *Long v. Davis*, 19 Ala. 801; 2 *Kent*, 623, (11th ed. by Comstock.) The evidence does not show that the payee in the note was the administratrix of the estate of any known decedent, or that the presumed sale was made by authority of any known court. Such evidence is worthless for any purpose in this case. What evidence there was tends to support the charges of the court, that the consideration of the note was worthless and had wholly failed. It was admitted without objection. The

Barbour County v. Horn.

withdrawal of the case from the jury by a non-suit was equivalent to an admission that it was true. If it was true, the consideration of the note had wholly failed, and the plaintiff could not recover. This being so, the action of the court, as shown by the record, was not erroneous.

The judgment of the court below is affirmed.

BARBOUR COUNTY *vs.* HORN.

[ACTION AGAINST COUNTY FOR DAMAGE OCCASIONED BY FALL FROM DEFECTIVE BRIDGE.]

1. *Action against county for damage from defective bridge; what allegation necessary.*—In an action against a county for damages occasioned by a fall from an imperfect bridge, established under contract with the commissioners court, made before the adoption of the Code of Alabama, the declaration should show that the bridge was a *toll-bridge*, and that the contract was such an one as the commissioners court had authority to make.
2. *Same; evidence of wealth or poverty of plaintiff or defendant irrelevant; evidence of disabling effect of injury is material.*—In an action against the county, to recover damages on account of injuries inflicted by a fall from a bridge built by contract with the commissioners court, the jury can not look to the wealth or poverty of the county or of the plaintiff, in making up the amount of their verdict. But they may consider the disabling effects of the injuries, whether past or prospective.

APPEAL from the Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

The complaint in this case is as follows: William D. Horn, plaintiff, *vs.* Barbour County, defendant. The plaintiff claims of the defendant twenty thousand dollars, as damages sustained by him in the loss of his health and in the permanent loss of the use of his limbs, and in the permanent impairment of his capacity to discharge his duties

as husband and parent, and to provide for his family and dependents, resulting directly and immediately from his fall from a certain bridge across Lick creek, in Barbour county, Alabama; which bridge, more than six years before said fall occurred, had been built and completed by contract with the court of county commissioners for said county, over said creek, and on the public highway in said county leading from Glennville, in said county, to Clayton, in said county, since known as the Glennville and Florence road. Said bridge was built by the order of, and under contract with, said commissioners court; and plaintiff avers that the only guaranty, by bond or otherwise, which was required or authorized by said commissioners court of the undertaker and builder of said bridge, was that he, the undertaker and builder of said bridge, enters into bond with good security to keep said bridge in good passable order for six years from the day of its completion, and that the aforesaid guaranty was required or authorized by an order of said commissioners court, made by it on the 16th day of August, 1852, and entered on its records. The plaintiff further avers, that more than six years had elapsed from the day of the completion of said bridge before the said fall, or any of the grievances or injuries herein complained of and stated, occurred; and that the said guaranty by bond, required or authorized by said commissioners court as aforesaid, had expired by the lapse of more than six years from the day of the completion of said bridge before said fall, or any injury to plaintiff herein stated and complained of occurred; and that at the time said fall and injuries to plaintiff herein stated and complained of occurred, there was no valid or subsisting guaranty, by bond or otherwise, under any order or authority of said commissioners court, or otherwise. The plaintiff avers, that after the expiration of said guaranty referred to and mentioned in said order of said commissioners court, to-wit, on the 10th day of October, 1858, when plaintiff was crossing said bridge in his buggy drawn by his horse, the said bridge was defective, unsound, and unsafe, and the said horse became

frightened at a hole in said bridge, and by backing with said buggy, in consequence of such alarm, suddenly, and without any fault on the part of plaintiff, and without any ability on his part to prevent its inevitable results, and in consequence of the said defective, unsound and unsafe condition of said bridge, precipitated said plaintiff and his horse and buggy over and from said bridge into the stream below, thereby causing said plaintiff serious and permanent bodily harm, and producing such physical disability as to greatly impair the health of plaintiff, and to destroy his power of locomotion and his ability to work and labor, and also greatly damaged his said horse and buggy, which were of great value, to-wit, of the value of one thousand dollars. And plaintiff avers, that within one year next after having sustained injury and damage as aforesaid, his account or claim for said damages sustained as aforesaid was regularly presented to the court of commissioners of said county for allowance and payment; and the said last mentioned court refused to recognize, allow or pay his said claim or account, or any part thereof.

Defendant demurred, in short by consent, and assigned as grounds of demurrer—1st. That the complaint sets forth no cause of action. 2d. That the complaint sets forth that the injury complained of took place on the 10th day of October, 1858, and also avers that the bridge, by the defects of which plaintiff says he was injured, was built by contract with the court of commissioners of Barbour county, under an order of said court made on the 16th day of August, 1852. The court overruled each of said demurrers, and defendant excepted to such ruling. The parties then went to trial on the plea of the general issue, with leave to give in evidence any matter of defense or in bar which might be specially pleaded under said issue, with like leave to plaintiff to reply. On the trial, the evidence conduced to show, among other things, that the plaintiff was a poor man, and dependent upon his labor for a support; that the injuries were of a very painful character; that plaintiff was subjected to expense, and that, besides

the immediate loss of time consequent, plaintiff was permanently disabled. The trial of the case, on application of the appellant, was changed to the county of Henry. The opinion of the court contains such other facts as are material.

The court charged the jury, among other things, as follows:

“The court of county commissioners had the right, under the law of this State in existence in the year 1852, to contract for the erection of bridges on public roads, and to require a bond from the builders to keep the bridge in a safe condition for a stipulated time, and if any one is injured, in consequence of a failure to keep the bridge in a safe condition during the time the bond or guaranty was in operation, then the person injured must look to the makers of the bond, who were bound to keep the bridge in a safe condition during the time they bound themselves to do so. But the builder of the bridge and his securities were only bound for injuries done within the time they obligated themselves to keep the bridge in a safe condition.”

The court further charged the jury, that “if the plaintiff was injured as alleged, and such injury occurred after the expiration of the time which the builder was bound by his contract to keep said bridge in repair, that then such builder was not liable on said contract, but that the county of Barbour was liable to plaintiff for the injuries aforesaid.”

To each of the charges so given the defendant excepted.

The defendant requested the court to charge the jury, among other things, that

“Neither the fact that Barbour county, with its wealth, is defendant, nor the fact of the poverty or family distress of plaintiff, Horn, nor the distress or mental suffering of plaintiff, in view of the consequences which his disability accruing from said injury may have brought, or may bring even upon his own family, can be taken into the account by the jury, in estimating the amount of damages or compensation which the county ought to pay plaintiff for said in-

juries." The court refused to give this charge, and the defendant excepted.

The ruling of the court on the demurrer, and the various charges given and the charges refused, are now assigned for error.

D. SEALS, STONE & CLOPTON, and FOSTER, for appellant.
PUGH & BAKER, and OATES & WOOD, *contra*.

PETERS, J.—This was an action on the case for damages occasioned by a fall from an insecure bridge, built by contract with the commissioners court in 1852, before the Code of Alabama went into effect as the law of the State. There is but one count in the complaint, and this is founded wholly upon our statutes. There was a demurrer to the complaint which assailed both the sufficiency of the statement of facts set forth in the count, and the formality of the statement. The demurrer was overruled, and the parties went to trial on the plea of the general issue, with leave to give all proper special matter in evidence to the jury. There was a verdict for ten thousand dollars for the plaintiff below, against the defendant, and judgment accordingly for this sum and costs. From this judgment the county of Barbour appeals to this court, and here assigns several errors on the overruling of the demurrer in answer to the plaintiff's complaint, and certain other proceedings in the court below in the charges and rulings adverse to the said defendant, as shown in the bill of exceptions taken on the trial below.

The demurrer to the complaint involves the most prominent question in the case as now made before this court. And this requires a construction of the statute upon which the right to recover on the facts stated in the complaint depends. And I proceed at once to the discussion which is thus urged upon the court.

The law, before the promulgation of the Code, which defines the powers of the court of county commissioners, or commissioners of revenue and roads, is found in Clay's

Digest. This embodiment of our statutes includes "all the statutes of a public and general nature in force at the close of the session of the general assembly in February, 1843." Title-page Clay's Digest. The law, as found in Clay's Digest, authorized the commissioners court to "exercise all the power in relation to roads, bridges, highways, and ferries and causeways" which were at that time "given to and exercised by the orphans or county court."—Clay's Digest, p. 149, § 1. This grant of jurisdiction seems to have been taken from the act to repeal and amend an act "to regulate the proceedings in the courts of law and equity in this State," which bears date June 14, 1821.—Toulmin's Laws of Ala. pp. 191, 200, § 28. In 1839, the legislature passed another statute defining the powers of the commissioners court, in which it is commanded, that "in all cases where there is no legislative enactment on the subject, the commissioners courts of the different counties shall have power and authority to adopt rules and regulations in relation to *toll-bridges*, causeways and ferries, as well as ways and public roads, and may, at any time, levy a tax to *build causeways* and *bridges*, when in their opinion the public good requires it; when the work is too great to be done by the proper overseer and his hands, or when no one applies, as hereinafter prescribed, to establish the same; *Provided*, That whenever any such work is necessary on the line between two counties, the same shall be done at the mutual expense of said counties, in proportion to the amount of taxable property in each."—Clay's Dig. p. 513, § 25. This enactment clothed the commissioners court with power and authority to adopt rules and regulations in relation to toll-bridges, causeways and ferries, as well as (private?) ways and public roads, and to levy taxes to build causeways and bridges, other than toll-bridges and toll-causeways. These latter were not to be built by a levy of a tax, because they were established under a different section of the same statute, and the "owner" built them, and gave bond to keep them in repair for travel and the transportation of the property of the passengers over them. This distinction is

clearly indicated in the section of the act already quoted above, by the words "when no one applies, as hereinafter prescribed, to establish the same." But under the authority to allow or license the establishment of toll-bridges and toll-causeways, the power was also given to take a guaranty by bond or otherwise, that the same shall continue safe for the passage of travelers and other persons for a stipulated time. The portion of the act conferring this authority is in these words: "When, in the opinion of the commissioners court, it is expedient to grant a license to any applicant to *establish* a ferry, toll-bridge, or causeway, they may do so, and shall at the same time prescribe the rate of toll or ferriage, and also require the applicant to enter into bond, with good security, in a sum not exceeding fifteen hundred dollars, payable to the judge of the county court of the proper county, and his successors in office, and conditioned, (in case of a ferry,) that the applicant will constantly provide and keep a good and sufficient boat or boats, and ferryman or hands, and keep the banks on each side of the water course in good repair; but in case of a toll-bridge or causeway, that it shall be well built according to the grade of the road it is on, and kept in good repair so that it may be passed at all times with safety and convenience; which bond they may, if they deem it necessary for better security, require the applicant to renew at any time on giving him ten days notice; and if he fail to do so, revoke his license. And should any person at any time sustain damages in consequence of the *owner* not having complied with the conditions of his bond, the person damaged may bring an action of debt or covenant on said bond in the name of the judge of the county court and recover damages to the extent of the injury sustained, to be applied to the use of the person injured, and such bond shall not become void by reason of the first or any subsequent recovery."—Clay's Digest, page 513, § 26. These two sections of the statute above referred to, so far as I have been able to ascertain from my own investigations, with the aid of the eminent counsel engaged on both sides of this cause, include all

the law upon the subject of bridges and causeways authorized to be built by contract with the commissioners court at the time the bridge in this case was erected, and up to the promulgation of the Code of Alabama. This law evidently divides bridges and causeways authorized to be established by the commissioners court into two classes. The one class consisting of toll-bridges and toll-causeways, and the other class consisting of free bridges and free causeways. In the former class of cases, the commissioners court were authorized and required to take guaranties, by bond of the "owner" or builder of the bridge or causeway, to keep the same in proper repair for safe travel over the bridge or causeway so built. In the other class of cases, a tax was authorized to be levied by the commissioners court to pay the cost of the erection of such free bridge or free causeway, in certain cases, but no authority is given to take any bond of the builder to keep any such free bridge or free causeway in proper repair for travel after the same may have been finished. As soon as such free bridge or free causeway was finished and received by the commissioners court and opened for travel over them, they became a part of the public highways of the State, which passed at once under the care and supervision of the overseer of the public roads of the counties in which they might lie.—Rev. Code, § 1341; Clay's Digest, p. 512, § 21. The guaranty mentioned in the complaint is not alleged to be a part of the contract with the commissioners court to build the bridge.—Clay's Dig. p. 511, § 19. And the evidence tends strongly to show that it was taken after the bridge was built and paid for. The commissioners court had not at that time authority to take such a bond. The act was *ultra vires*. It had no effect. *Pearce v. M. & I. R. R. Co. et al.*, 21 How. 441, and cases there cited. Besides, the bond was not such a bond as is indicated for a toll-bridge, either in the amount of its penalty or its condition. It was a nugatory act, and void.—21 How. 441, *supra*. It had no effect whatever. And the enactment subsequently passed, which is found in the Revised

Code, giving a remedy against the county for damages resulting from an unsafe bridge or causeway which had been erected by contract with the commissioners court, with a guaranty, by bond or otherwise, that such bridge or causeway shall continue safe for the passage of travelers and other persons for a stipulated time, was intended to apply to toll-bridges and toll-causeways; because the guaranty by bond there referred to is a valid guaranty by valid bond, and not a bond taken without authority; but such an one as will support an action in favor of the party injured against the makers of the bond for damages to person or property before the expiration of the period of limitation, during which the bridge or causeway should remain safe for travel.—Revised Code, § 1396. This is also very clearly the legislative construction of the section of the Revised Code last above referred to; as is shown in the amendment of said section by the act of February 18th, 1870, in which free bridges are put upon the same footing with toll-bridges and toll-causeways. This amendment would not have been made unless there had been a deficiency in the original act.—Pamph. Acts 1869–70, p. 148, Act No. 141. Moreover, if the period for the limitation, beyond which the liability of the obligors in the bond for the enforcement of the guaranty would have ceased, had not expired, and the action was brought upon the bond by the obligors, and not against the county, then it would be necessary to show from the statute that the taking of the bond itself was such a transaction as the commissioners court had authority to accomplish. Without such authority, the bond would be a nullity.—21 How. 441, *supra*. At the date of the bond in this case, the authority of the commissioners court depended solely upon the statute of 1839. In this act nothing is said of power to take a bond for enforcement of a guaranty as to the continued safety of the bridge for a stipulated length of time, when the bridge was not a toll-bridge.—Clay's Dig. p. 513, §§ 25, 26; also, Rev. Code, §§ 1383, 1385, 1390. Even the authority of the court of county commissioners under the Code is

not a general jurisdiction, but it is required "to be exercised in conformity with the provisions" of the Code.—Rev. Code, § 831. This puts the power wholly upon the statute law. And there is no provision of the Code, that I have been able to find, which gives authority to take such a bond as that mentioned in this case.—Rev. Code, §§ 1310, 1341, 1397. In such an action against the obligors, this court would be compelled to declare this bond void; that is, a nullity. This is clearly not such a bond as that intended in the Revised Code.—Rev. Code, § 1396. And the complaint is deficient in failing to allege that the commissioners court had authority to take the bond relied on, or that the bridge mentioned in the pleadings was a toll-bridge. *Barbour County v. Horn*, (in MSS.) The demurrer was, therefore, erroneously overruled. It should have been sustained, with leave to the plaintiff in the court below to amend his complaint as he might be advised and the facts of his case would justify.—Rev. Code, § 2657. I think that it scarcely admits of doubt, that the officers of the county, who are its corporate agents, have no power to subject the county, by their acts or their failure to act, to a suit for damages, unless the power is expressly or impliedly given by statute.—*Covington County v. Kinney*, 45 Ala. Rep. 176; *Fowle v. Common Council of Alexandria*, 3 Pet. 368. Nor could they transfer to the builder of a public or free bridge the duty of keeping it in repair and safe for travel, which duty belonged to the overseer of the public road.—Rev. Code, § 1341; Clay's Dig. p. 512, § 27. The charge of the court which was given, without the request of either party, on the trial below, was also based upon a misapprehension of the law, as it existed in 1852, in reference to the powers of the commissioners court to contract for the building of free bridges. It is opposed to the construction above given, and is erroneous. For these errors the judgment must be reversed. And this opinion might here conclude, if it were known that the plaintiff in the court below would refuse to make any further amendment to his complaint. But as this can not be known to this court, nor what case may be

made on an amended complaint, there are some other questions raised by the charges given and refused on the trial below, that may come up on a new trial, and they should be settled on this appeal. The one is, as to the date from which the "stipulated time" for the continuance of the guaranty should begin, and when it should end. The allegations of the complaint put its beginning at the "completion of the bridge." The bond makes the period of time thus stipulated six years, but without indicating the time of its commencement or its end. The bond does not show when the bridge was completed. It could not, then, be inferred from the bond itself when "the stipulated time" expired, so that, as a matter of law, it could be declared by the court. It must, then, be left to the jury, upon all the evidence delivered to them on the trial. This was the result of our investigation when this cause was here at the January term, 1871. The bond may be referred to the order of the court directing it to be taken. This order shows that "the commissioners" appointed to let out the building of the bridge were empowered "*to contract for the erection of a new bridge over Lick creek, at the Beauchamps Camp Ground, requiring the undertaker to enter into bond with good security to keep the same in good passable order for six years from the day of its completion.*" The day of the completion of the bridge was not a fact fixed by the bond. It was, therefore, proper to leave its ascertainment to the jury, as any other fact not admitted on the trial. The action of the court below on this point, in this case, on the trial below, was correct.

The other question above referred to involves the consideration of the elements which enter into an estimate of the damages in such a case as this. Damages, it is said, are intended as a pecuniary compensation to the party wronged for the hurt inflicted; to be great or small, in proportion to the injury itself. And where there is no malice connected with the wrong complained of, or such gross negligence, or oppression, or fraud as amounts to malice, the compensation or amount of damages should be con-

fined to the actual injury and its immediate effects upon the person of the plaintiff, when the action is for harm to the person, which seems to be the case here.—Sedgw. Dam. pp. 28, 29, 35, 36, *et seq.*; 2 Black. Com. 438; Coke, Litt. 257a; *Dexter v. Spear*, 4 Mason, 115; *Rockwood v. Allen, Ex'r*, 7 Mass. 254; *Bussy v. Donaldson*, 4 Dall. Penn. R. 206; *Donnell v. Jones*, 13 Ala. 490, 508. How this compensation shall be estimated by the jury, must depend upon the facts of each particular case. In such a matter, the jury can not be allowed unlimited and uncontrolled discretion.—Sedgw. Dam. pp. 30, 409, App. No. 1; 2 Greenl. Ev. §§ 253, 254; *Walker v. Smith*, Wash. C. C. R. 152; Sherm. & Redf. on Negl. p. 674, §§ 600, 601; also, *Bell v. Cunningham*, 3 Pet. 69, 86. But the authorities which define the practice under the admitted rule for the measure of damages, in all cases that may arise, seem not wholly free from confusion and uncertainty. In such a case as this, there can be no vindictive damages; and as there is no continuing trespass, but one action can be brought.—*Conard v. Pacific Ins. Co.*, 6 Pet. pp. 262, 282; *Tracy v. Swartwout*, 10 Pet. 80, 85; *Fetter v. Beal*, 1 Lord Raym. 339. Yet it is evident that the direct consequences of the injury may extend to the future as well as to the past. And it is for the disabling effects of the injury, whether past or prospective, that the plaintiff is entitled to compensation.—3 Bouv. Bac. Abr. p. 57, and cases *supra*. Then, the jury may consider the expenses of the cure, and if the injury is irremediable, and will necessarily require future treatment and nursing, the probable costs of this, also, may be added; so, likewise, the loss of time up to the verdict, and the probable loss of time in the future, and the pain inflicted upon the body.—2 Greenl. Ev. § 267; *Fetter v. Beal*, *supra*. These are *things of value*, capable of pecuniary admeasurement, and which the plaintiff *loses* by the injury, or they are *burdens imposed* upon him by the conduct of the plaintiff, against the *effects* of which he is entitled to indemnity, so far as a pecuniary compensation can afford it. But the wealth of the defendant, or poverty of the plaintiff, has

nothing to do with their ascertainment. It was, therefore, improper to admit evidence of the wealth of the defendant in the court below to go to the jury, or to refuse to instruct the jury, when properly requested, that the defendant's wealth could not be taken into consideration in making up their verdict.—2 Greenl. Ev. § 268; *Wilcox v. Plummer*, 4 Pet. 172, 182. It may be also proper to remark, that in cases where there is a total loss of the services by the death of the person injured, the legislature has fixed a proper rule for the highest assessment of the damages; that is, the sum of one hundred dollars, annually, for thirty years, which is about the estimated period of one life, upon a general average.—Rev. Code, § 2298. Although a jury would not be bound by this rule, except in case of the death of the person injured, yet so far as loss of time is involved it might furnish a basis of a correct result; one, at least, fixed by positive law, in a similar case, where the loss of time is permanent.

It is urged by the learned counsel for the appellee, that if the judgment of the court below is reversed, then the cause should not be remanded, but dismissed. I do not think so. The plaintiff has the right to amend his complaint on sustaining the demurrer. In this, he can put any thing into his amended complaint which shows that he has been wronged by the defendant, and that the wrong so alleged is the subject of an action at law. This court has no authority to presume what this will be. It can only act upon the case brought here on appeal.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

LOCKHART ET AL. *vs.* THE CITY OF TROY.

[APPEAL FROM ORDER DISSOLVING INJUNCTION RESTRAINING MUNICIPAL TAXATION, &C.]

1. *Injunction; when dissolved on unsworn answer.*—In an injunction bill, if the complainants *wave* the answers of the defendants being “made on oath,” this does not impair the right of the defendants to have the injunction dissolved upon the denials of such unsworn answers, in like manner as if they were sworn.
2. *Subject of act; what sufficient expression of, in title.*—The *subject* of a law to incorporate a city or town is the *charter of incorporation*. This subject is sufficiently expressed in the title, by the words “An act to establish a charter for the city of Troy, in Pike county.” The title need not set out an enumeration of all the powers intended to be conferred on the corporate authority.
3. *Supplemental act; when not unconstitutional for non-compliance with Art. 4, section 2, of constitution.*—An act “supplemental” to another act need not set out the act to which it is supplemental, in order to make it conform to the constitution, which requires, in case of the revision or amendment of a former act, that the “new act” shall contain the act “revised or amended.”—Const. Ala., Art. 4, § 2.
4. *Healing act; test of constitutionality of.*—A healing statute is not bad for unconstitutionality, if it gives validity to an act irregularly done, which the legislature could have authorized to be done in the irregular way in the first instance.
5. *Acts of person disqualified to hold office; valid as acts of de facto officials, until inquisition of office.*—The official acts of a person disqualified to hold office, “by reason of his participation in the late rebellion of the so-called Confederate States against the United States,” are not void, when such person holds his office under authority of the rightful government of the State, until after his right to the office is determined against him in some legal way.

APPEAL from the Chancery Court of Pike.

Heard before HON. ADAM C. FELDER.

The opinion sets out the facts.

WALKER & MURPHEY, for appellant.

STONE & CLOPTON, *contra*.

Lockhart et al. v. The City of Troy.

PETERS, J.—This is a bill in chancery to enjoin the collection of a tax levied by the city of Troy on the property of certain of its citizens, to pay the principal and interest on certain bonds issued and sold by said city to aid in the construction of the Mobile & Girard railroad. The bill is an injunction bill, and seeks no other relief. The injunction was granted, and on motion before the chancellor, on the coming in of the answers, the injunction was dissolved. And the complainants appeal from the decree, dissolving the injunction, to this court, and here assign this decree dissolving the injunction as the only error.

The statements of the bill, upon which its equity is presumed to rest, are directly denied by the answers. But it is contended, that as these denials are made in answers made without the support of a verification by oath, they ought not to be permitted to overturn the allegations of the bill, which is a sworn bill. But the complainants waive any oath to the answers, yet require them to be made and put in, upon the penalty of admitting the bill to be true, upon decree *pro confesso*. This is a privilege in favor of the complainants, which they can avail themselves of or not, as they choose. It takes from the answers their potency as evidence, and dispenses with the necessity, which would otherwise exist, of requiring two witnesses to overturn them.—Rev. Code, § 3328. If, then, the complainants elect to waive the answers being made upon oath, it should not prejudice the defendant's rights beyond the limitation of the statute; that is, it leaves the answers in every other respect sufficient, except as testimony. Such unsworn answers are "entitled to no more weight as evidence than the bill." It does not destroy its effect as a denial of the complainants' case. To treat them otherwise, would be to go beyond the purpose of the statute, and put it in the power of the complainants to use a privilege granted to them as a serious injury to the defendant beyond the purpose of the law. This would be neither equity or justice, which is supposed to prevail in all the proceedings in a court of chancery. I therefore think that answers, the

oath to which is waived by the complainants, must be treated as answers on oath, on motion to dissolve an injunction.

But the principal questions in the case arise out of the legislative enactment out of which the proceedings complained of arose. The town or city of Troy has been for some time a municipal corporation in this State, so created by an act of the general assembly of Alabama. It appears that the track of the Mobile & Girard railroad passed near or through the place. And for the purpose of aiding in its construction, and to insure its completion, a majority of the real estate holders of said town procured the passage of a law by the general assembly, at its session in 1868, 'conferring on the corporate authorities of said town power to subscribe to the capital stock of said railroad. This law is entitled "An act supplemental to an act to incorporate the town of Troy, in the county of Pike, and to authorize said municipal corporation to levy a tax for a subscription to the stock of the Mobile & Girard Railroad Company." It was approved December 8, 1868. The third section of this act is as follows: "Sec. 3. *Be it further enacted*, That the corporate authorities of said town of Troy are hereby authorized and empowered to subscribe to the capital stock of the Mobile & Girard railroad, a sum not exceeding seventy-five thousand dollars; said sum so subscribed to be applied exclusively to the extension of the track of the said Mobile & Girard railroad to the said town of Troy, upon or near the line already surveyed from or about Faulk's bridge, or the line of deflection. To pay for the subscription so made, said corporate authorities are hereby authorized and empowered to issue bonds, bearing interest at the rate of not higher than eight per centum; and for the liquidation of said bonds, with the interest thereon, said corporate authorities are further authorized and empowered to levy a tax on the real estate within the corporate limits of Troy; *Provided*, that no tax for this purpose shall exceed in any one year ten per cent. of the amount of the bonds issued and the annual interest thereon; but

Lockhart et al. v. The City of Troy.

none of said bonds and interest due thereon shall be due or payable until said railroad is in running order, and the cars run to said Troy, nor shall any sale of said bonds be made by the corporate authorities at a discount of greater than twelve and one-half per cent.”—Pamph. Acts 1868, p. 395. Under the provisions of this act, on the 22d day of December, 1869, the corporate authorities of said town of Troy authorized the issuance of the bonds of said town to the amount of \$50,000 only, “for the extension of the Mobile & Girard railroad from the point of deflection above Faulk’s bridge, on Conecuh river, to said town of Troy.” A copy of one of the bonds thus issued is set out in the bill, and bears date January 13, 1869. After these bonds were so issued, a second act of the general assembly of this State was passed and approved on the 17th day of February, 1870, entitled “An act to establish a charter for the city of Troy, in Pike county.” This latter act authorized and required the mayor and councilmen of Troy “to levy and collect a tax upon all real estate in said corporate limits” of said town “for the purpose of paying the principal of and interest upon the amount of the bonds commonly known as the bonds of Troy in aid of the Mobile & Girard railroad.”—Pamph. Acts 1869–70, pp. 123, 133, § 22. Under the authority of this last named act, “said town authorities proceeded to assess the taxes upon the real estate within the corporate limits of Troy,” “for the purposes indicated in said act for the year 1870.” And the bill shows that the property of the complainants was assessed in this levy, to the amounts named in the bill, and that the authorities of said town, by their tax collector, were proceeding to collect the same by legal process. It is also charged, that the city corporation acted fraudulently in issuing said bonds, and that the acts above mentioned were unconstitutional and void.

The bill was amended by leave of the court, after the issuance of the injunction, and in the amendment it is charged that certain members and officers of said city government who authorized the issuance of said bonds as set

forth in said original bill, "were disqualified from holding said offices, by reason of having held certain offices in this State "prior to the late war, and afterwards voluntarily participated and aided in the late rebellion of the so-called Confederate States against the United States." It is also alleged that said bonds were not issued in accordance with the act of the general assembly of this State approved October 8th, 1868, or any other act of the legislature of this State. It is also alleged, that the corporate authorities of the town of Troy have never subscribed stock in the Mobile & Girard railroad to the amount of \$75,000, or any other amount, and the said bonds were not issued to pay said subscription for said stock as contemplated in the said acts above mentioned. The answers to the bill and amended bill fully and directly deny all the material allegations of both bills, and show that the proceedings by said city of Troy under said acts were strictly in conformity thereto. And the defendants insist, that whatever irregularities, if any may have intervened in said proceedings, are legalized and made valid by the healing act of the general assembly of this State of January 20, 1870.—Pamph. Acts 1869-70, p. 30, No. 40.

The objection which remains to said decree dissolving said injunction, is founded on the supposed unconstitutionality of the acts mentioned in said bill and amended bill. This objection is founded on the titles to said acts. It is insisted, that the titles to these acts, and the acts themselves, are not in conformity with the constitutional requisition. The constitution requires that "each law shall contain but one subject, which shall be clearly expressed in its title; and no law shall be revised or amended unless the new act contain the entire act revised, or the section or sections amended; and the section or sections so amended shall be repealed."—Const. Ala. Art. 4, § 2. It is very evident that an act to incorporate a town or city, or an act to establish a charter for a town or city, necessarily may, and must, contain a grant of all the powers intended to be conferred on the corporation. This will embrace all the sub-

Lockhart et al. v. The City of Troy.

jects incident to such a corporation. The subject of such a law is "the charter of incorporation." And the act may embrace whatever is necessary for this end. The title need not be an index to the act; nor need it state a catalogue of all the powers intended to be bestowed. This is included in the thing created; that is, "the charter of incorporation." The construction contended for by appellees seems to be too technical and strict. It would tend to defeat, rather than render simple and certain the legislative will. *Ex parte Selma & Gulf Railroad*, 45 Ala. 696; *Ex parte Pollard*, 40 Ala. 77; *Dale County v. Gunter*, 44 Ala. 639; *People v. Mahaney*, 13 Mich. 495; Cooley on Con. Lim. 81, 141, 144. Supplemental acts and healing acts do not necessarily fall into the category of a revised or amended act. A supplemental act merely adds something that was left out of the original act. It does not necessarily revise it or amend it in the more technical sense. An amendment is what may be incorporated into the original on its passage. A supplemental act is an independent law; and a healing act is one that cures some defect in a proceeding which the legislature could have authorized in the first instance. In legislation, each form of proceeding has its proper scope, though each may approach the other so nearly as in some degree to mingle into the same form.—Webster's Dict., *ad voces*, *Amendment*, *Supplemental* and *Healing*. I think the statutes set out in the bill free from constitutional objections.

The objection, that certain members of the city government of said town or city of Troy "were disqualified from holding said offices," in consequence of having held office in this State under the State government before the late war, and afterwards having participated in the rebellion, is not enough to render their acts void. They were officers *de facto* under a rightful government, and as such, their acts were valid, until their titles to the offices they held were adjudged insufficient.—*Mayo et al. v. Stoneum, Ex'r*, 2 Ala. 390; 2 Kent, 295, and Notes, (Comstock's ed. 1866.) This objection, then, was not available.

The decree of the court below is affirmed, with costs.

SOUTH-WESTERN RAILROAD CO. *vs.* WEBB.

[ACTION AGAINST COMMON CARRIER FOR FAILURE TO DELIVER COTTON RECEIVED
FOR TRANSPORTATION.]

1. *Common carriers; what are.*—Under the laws of Alabama, railroad companies are common carriers, and subject to all the liabilities of such carriers. Where suit is brought in this State against a common carrier for failure to deliver freight received for transportation, (under contract made and to be performed wholly in another State,) it will be presumed, in the absence of proof to the contrary, that the common law, as to common carriers, prevailed in the State where such contract was entered into and was to be performed.
2. *Same; when not liable for failure to deliver goods, &c.*—In an action against a railroad company for failure to deliver cotton received by it for transportation, &c., it is not liable for cotton stolen or lost after a deposit on a platform at a station-house, unless it be shown that the railroad company or its agents had notice of the deposit and received the cotton for transportation as a common carrier.
3. *Same; delivery a question of fact.*—In such an action, it is a question of fact to be determined (under appropriate instructions from the court) by the jury from all the evidence, whether or not there was a *delivery* to the carrier for transportation.

APPEAL from the City Court of Eufaula.

Tried before Hon. E. M. KEILS.

This was an action brought by appellee, against the appellant, to recover damages for its failure to deliver three bales of cotton, received and accepted by it as a common carrier, for transportation, &c.

The evidence offered tends to show that the plaintiff, by his agent, the wagoner who hauled his cotton to the railroad depot, informed the railroad agent, at the depot to which the cotton was carried to be shipped, that he had some nine bales of cotton which he wished shipped at that particular station, which was in the State of Georgia, and sent to Macon in that State. Four bales were first sent. These were received by the agent in charge of the depot,

by delivery on the platform at the station, and were properly sent forward as required by the shipper. Some time after this, two other bales were sent and delivered in the same way to the agent of the railroad company on the platform as before, and these bales were also properly forwarded and reached their destination. Then, after some delay, three additional bales of cotton were sent to the depot as before. They reached there about noon. The receiving house of the company was closed, and there was no agent there to receive the cotton. The wagoner who brought the cotton put it on the railroad platform, as he had done the other bales that had been brought before, and left it there, without seeing the railroad agent or any one about it, and without giving any instructions about its shipment or safe-keeping. Shortly after its deposit on the platform, it was stolen, and lost to the owner, the appellee. There was some other evidence as to the instructions of the railroad company to its agents as to giving receipts upon shipments, and which tended to show a denial on the part of the agent of the company that the cotton had been delivered to him for shipment, or that he had any notice of its delivery on the platform until after it had been stolen.

This was substantially all the evidence.

After the court had given several charges, at the request of the plaintiff, the defendant requested in writing, among other charges, the following:

“1st. The plaintiff is not entitled to recover in this action, unless the evidence satisfies the jury that the cotton alleged to have been lost was delivered to the defendant, or its duly authorized agent, who accepted and received the cotton for transportation.”

“6th. That the delivery of the three bales of cotton to the railroad company is a question of fact to be judged of by the jury, from all the evidence with reference to all the circumstances of the case, and the usual course of business in similar transactions at the same place, with the same company.”

“7th. That if, from all the evidence in the case, the jury

believe that the delivery of the three bales of cotton, and notice of the same, were not made and given in the usual course of business in similar transactions at the same place, and with the same company, then the plaintiff can not recover in this action."

The refusal to give these charges, (as well as the rulings upon other matters not material to an understanding of the case,) is now assigned for error.

SHORTER & BROTHER, for appellant.

JOHN COCHRAN, *contra*."

PETERS, J.—It is now too well settled in this State to admit of question, that railroad companies are common carriers, and as such, that they are amenable to the liabilities imposed by the law applicable to common carriers, as the same is administered in this State.—*Selma & Meridian R. R. Co. v. Butts & Foster*, 43 Ala. R. 385; Jeremy's Law of Carriers, 4, chap. 1; Redf. on Car. p. 27, chap. 3, § 37, and the numerous authorities cited in the notes. There is no question made in this court as to the place of making the contract of transportation, or undertaking the duty to transport. The proceeding will, then, be treated as a transaction governed by the common law applicable to common carriers. The suit here is against the corporation only as a common carrier, and not as a warehouse keeper or a common bailee of goods and chattels delivered, to be kept safely for shipment. And the dominant question in the case is, when does the liability of the railroad company for transportation of goods and other articles to be carried on this road begin? Certainly, just where that of any other common carrier's liability would begin; that is, as soon as the goods are delivered and received for transportation.—*Marriam v. Hartford and New Haven R. R. Co.*, 20 Conn. 354; S. C., 2 Amer. Railway Cas. 135; Story on Bailm. p. 537, § 532; see, also, *Hannibal Railroad v. Swift*, 12 Wall. 262. In this State, under our statute, there is a duty imposed by law on the carrier to give "a receipt" for the article delivered for transportation.—Rev. Code, § 1883.

The goods or articles to be carried must be delivered for transportation, before the liability for their loss or injury, or for a failure to forward them in due course of transportation, is incurred. In this case, the cotton was lost before the actual transportation was commenced. The question, then, upon which the cause is to be determined in its present shape, is this: Was there a delivery of the cotton lost, *for transportation*, to the railroad company, or its agent, before the loss? If there was such delivery for transportation, then the company are liable; if there was not, then the company are not liable as common carriers. Whether there was such a delivery or not, is a matter of fact, and it must be determined by the jury. Governed by this exposition of the law, the learned judge in the court below erred in refusing to give the *first*, *sixth* and *seventh* charges asked by the defendant on the trial before the jury. It is, nevertheless, contended by the learned counsel for the appellee, that there should be no reversal in this case, even if there has been error in the action of the court below; because, I suppose, he presumes that all the evidence delivered to the jury on the trial is set out in the bill of exceptions, and this shows, taken as a whole, that the plaintiff ought to have recovered. This may be true, as the case was presented to the jury on the trial. But we have seen that that presentation was inaccurate, in failing to bring to the attention and consideration of the jury the law of the whole case. The refusal to charge that a delivery for transportation was necessary to bind the defendant, sanctioned a finding against the corporation without such proof; which was erroneous. And this error is of such a character that it may have defeated the defense, when it should have prevailed, upon a proper presentation of the law on both sides. It would have been improper for the court below to have charged the jury, that if they believed the evidence they must find for the plaintiff. Such a charge would have been an invasion of the province of the jury. It would have made the verdict, in truth, the verdict of the court, regardless of the jury. This is error.—*Battle v. Weems*, 44 Ala.

105. If this court should affirm such a judgment, it would ignore the jury altogether.

I purposely omit to discuss the other charges given and refused in the court below, as what has already been said will enable the court, upon a new trial, to charge the law correctly. And nothing is intended to be declared as to what facts will prove a delivery for transportation.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

STOUDENMIRE vs. WARE.

[ACTION ON PROMISSORY NOTE.]

1. *Promissory note; when without consideration.*—A promissory note given for the debt of another, on the assurance of the payee that the agent of the debtor will pay it on request, but without the knowledge or assent of such debtor or his agent, is without consideration, notwithstanding the note is made payable some time after the transaction, and the claim against the debtor is receipted and delivered to the maker.

APPEAL from the Circuit Court of Perry.

Tried before Hon. M. J. SAFFOLD.

The suit was on a promissory note made by the appellant in favor of H. H. Ware & Co., and by them indorsed to the appellee's intestate, who was one of the firm of Ware & Co.

John H. Stone was indebted to Ware & Co. on an open account, for merchandise sold to him. H. H. Ware induced the appellant, who was under no obligation to do so, to give the note for Stone's indebtedness, by assuring him that Stone's agent would pay the debt on request. This agent afterwards delivered to the appellant certain property to indemnify him against other liabilities of Stone

for which he was surety, but not against this. None of it had been applied to the payment of any portion of this debt, and it was not sufficient therefor, after satisfying the other obligations. The agent, on the appellant's application for payment of the debt for which he had given his note, promised to pay Ware & Co., but he had not done so. The account against Stone was receipted and given to the appellant at the time he made his note. The note was dated May 2, 1861, and was payable on the first of January afterwards. There was no evidence that Stone or his agent knew of the transaction between the appellant and Ware & Co. at the time. The court charged, that under the evidence the verdict must be for the plaintiff, and refused to charge that it should be for the defendant. The charge given, and the refusal to charge as requested, are now assigned as error.

JOHN C. REID, for appellant.

FELLOWS & JOHNS, *contra*.

B. F. SAFFOLD, J.—Under the evidence disclosed in the bill of exceptions, the note, the foundation of the action, was without consideration.—*Williams v. Sims*, 22 Ala. 512; *Beall & Co. v. Ridgway*, 18 Ala. 117. The court below, therefore, erred in the charge given, and in its refusal to charge as requested.

The judgment is reversed, and the cause remanded.

DENECHAUD ET AL. *vs.* BERREY.

[BILL IN EQUITY BY MARRIED WOMAN TO HAVE NOTE EXECUTED BY HER AND HER HUSBAND, AND SECURED BY MORTGAGE ON HER SEPARATE STATUTORY ESTATE, AND SALE OF MORTGAGED PREMISES, SET ASIDE, &c.]

1. *Statutory separate estate; what words of conveyance create.*—A deed made August 12th, 1865, conveying to a married woman in this State lands situated here, “for her sole and separate use and benefit,” create in her a statutory separate estate, governed by all the restrictions and limitations contained in the Revised Code for the regulation of the “separate estate of the wife.”
2. *Same; effect of words “for sole and separate use,” &c.*—The words “for her sole and separate use and benefit,” contained in such a deed, do not change the character of the estate which the married woman takes thereby. By force of the provisions of the Code, that would be the legal effect of the deed, although it contained no such words.
3. *Same; married woman can not mortgage, &c.*—An estate so created, is not subject to be encumbered by the wife’s mortgage, as at common law, to secure her own or her husband’s debt contracted after the Code went into effect.
4. *Same; principles applied in case at bar.*—In the case at bar, this court affirmed a decree, ordering a note made by husband and wife for a loan of money, secured by mortgage on what was held to be the wife’s separate statutory estate, to be given up for cancellation, &c., and setting aside and cancelling a sale and conveyance of the mortgaged premises under the power of sale, and decreeing an account against purchaser at such sale for rents, &c., and restoring possession of mortgaged property sold.

APPEAL from the Chancery Court of Mobile.

Heard before Hon. ADAM C. FELDER.

The bill in the present case was filed May 3d, 1869, the facts of which may be stated as follows: Complainant, Eliza L. Berrey, in 1849, intermarried with John Berrey, in this State, every since which time they have resided here.

On the 12th day of August, 1865, she received a warranty deed in fee from one Herbert to a house and lot in Mobile county. The consideration expressed in said deed is four thousand dollars, paid said Herbert by complainant;

and the bill also alleges that the property was paid for by her brother and given to complainant. The *habendum* clause of the deed was as follows: "*To have and to hold* the above described premises, with all improvements thereon, to the said Eliza L. Berrey for her sole and separate use and benefit forever."

In the year 1867, complainant and her husband mortgaged the premises to E. F. Denechaud, the instrument reciting that it was given "to secure a note for two thousand dollars, made by Mrs. Berrey and her husband, payable six months after date." It is alleged in the bill that this mortgage was given to secure a note executed by complainant and her husband to said Denechaud for money loaned her husband, and debts then due by him to Denechaud, and "that no part of the money or other consideration of the note was ever used or received by complainant."

Denechaud transferred the mortgage, shortly after maturity of the note, to A. Del Trigo, a citizen of New Orleans, La., reciting in the transfer that he had taken the mortgage as Del Trigo's agent. In May, 1868, the debt not having been paid, Del Trigo, in pursuance of the power contained in the mortgage, sold and conveyed the premises to Juniata Denechaud, his daughter, and the wife of said E. F. Denechaud, who, with her said husband, entered into possession by a tenant, and have ever since so continued. The value of the yearly rental of the premises was alleged to be five hundred dollars.

John Berrey, Del Trigo, E. F. Denechaud, and Juniata, his wife, were parties defendant, and the prayer of the bill is, that the mortgage and sale under it be declared void; that the note, mortgage and conveyance at the mortgage sale be delivered up for cancellation; that complainant have possession of the premises restored to her; and that the defendants be decreed to account to her for the rents, revenues and profits of the premises since the sale and their possession under it, and for general relief.

There was a decree *pro confesso* as to Berrey. The other defendants answered, and also demurred to the bill; the

principal ground of demurrer being that the deed from Herbert to complainant showed that she had such an estate in the premises as could be conveyed by mortgage, &c.; and, 2d, that it did not sufficiently appear that the money for which the note was given, was not furnished at complainant's request, to be invested for her use, whether so used or not. 3d. For want of equity.

Denechaud and wife, in their answer, which was sworn to, (oath not having been waived,) admit complainant's marriage with Berrey as stated, the conveyance to her by Herbert, the execution of the note and mortgage, and the sale under it, and purchase and possession by Juniata Denechaud; but state that the sole consideration of the note was money parted with at the time by Denechaud for the use of Mrs. Berrey, complainant, and at her request handed her husband, John; and that this was the sole consideration for the note and mortgage; that the money thus loaned belonged to Del Trigo, whose agent Denechaud was in the transaction in loaning it out, &c.; that the rental value of the premises was much less than five hundred dollars per annum, and that they had spent large sums for taxes, insurance, and improvements on the buildings since their purchase.

Del Trigo's answer, which was also sworn to, was the same in substance as that of the Denechauds. At the sale made under the power of sale given in the mortgage, he furnished his daughter the money to purchase, &c., by paying to himself the amount of the mortgage debt, and causing a deed to be made to her sole and separate use, &c.

All the respondents deny that the land purchased from Herbert was purchased by complainant's brother, or with her money, and proof as to this was required.

Complainant was examined as a witness in her own behalf, and she also took the depositions of her father, Hiram Carver, her husband, John Berrey, and of one John H. Bostwick. The respondents examined Major Henry St. Paul.

It is not clear, from the testimony, with whose money

the house and lot were originally purchased, but it is shown that it was not purchased with complainant's money, and the preponderance of the testimony went to show that it was made with John Berrey's money.

Berrey was notoriously insolvent, and reckless in his habits, dissipated and a spendthrift, and had been for some time out of employment when the loan was made.

Bostwick testified, that he heard of Denechaud's having money to lend, and as Berrey owed a firm of which Bostwick was a member, he felt interested, and informed Berrey, who called on Denechaud, and was told to take the deeds to St. Paul, Denechaud's attorney and legal adviser, for examination.

St. Paul testified, among other things, that he was called on at his office by John C. Berrey, who told him about the intended loan to his wife, "Mrs. Berrey," and that Denechaud wanted witness to look into Mrs. Berrey's title deeds; that "Berrey was very pressing; and when the deed was ready, one or two days afterwards, he wanted me to let him have it and he would have it signed by his wife. I told him that this was impossible, and that before anything was done, I had to see his wife myself, and ascertain, apart from him, whether the loan was really desired by her, and for her own benefit. Berrey said she should tell me all about it herself; that she knew he was not lucky in business, and that she wanted to support her children by working in her own name, and as a partner with a gentleman whom he named, (the same that afterwards signed the deed with me as a witness,) John H. Bostwick."

In his testimony, St. Paul further states, that he called at Mrs. Berrey's residence and saw her privately. She told him that she "wanted the money to go into partnership with a gentleman to make a support for herself and her children, who were in want." The nature of the mortgage was fully explained to her by St. Paul.

Bostwick stated that he might have said something about using the surplus of money, after paying Berrey's debts, for the use of the family, but denied having said so to Mrs.

Berrey, or her knowing anything about it. St. Paul testified directly the opposite.

Mrs. Berrey, in her testimony, denies having the conversation with St. Paul, as stated.

The proof was conflicting as to whether the note was given to secure any other debt than that growing out of the loan. Berrey and the other witnesses for complainant testified that Berrey spent the money obtained on said note (usurious interest on which, was deducted in advance from the amount called for on the face of the note,) in paying his own debts. Mrs. Berrey denied positively having received any benefit from it. The proof showed that some of the money loaned went to the payment of taxes on the property, &c.

The demurrer having been overruled at a former term, the cause was submitted for final decree on bill and exhibits, answers of the defendants and decree *pro confesso* against Berrey, agreement of counsel, and testimony.

The chancellor decreed that the complainant was entitled to the relief prayed; that the mortgage and note, and the conveyance under the mortgage sale, be delivered up and marked cancelled, and filed with the papers in the cause, and held for naught. A reference was also ordered, to take an account of the amount due for rent of the land while in possession of Juniata Denechaud.

The defendants appeal, and here assign for error, among other things—

1st. Overruling the demurrer.

2d. The decree rendered.

3d. In decreeing a reference to register to take an account of rent, without regard to improvements made on the place, taxes paid, &c.

4. In ordering the note to be cancelled, although signed by John Berrey as well as his wife, and as to him at least being valid and supported by a sufficient consideration.

5. In ordering the note and mortgage to be cancelled, and in decreeing the sale under it void.

A. R. MANNING, for appellant—Recapitulated and criticised the testimony, contending that it showed that there was a conspiracy between John C. Berry and Bostwick, by means of false representations, to get this money from Denechaud, for their own use, upon a mortgage of the property of Mrs. Berrey; although thereby they put her in imminent and almost unavoidable peril of being driven with her children from the only home and shelter she possessed; and that she was induced to co-operate with them. Whether she did so voluntarily or only under their pressing influence, can make no difference so far as the rights of Mrs. Denechaud are concerned.—*Sheppard v. Shæffer*, January term, 1871.

II. He also contended, that under the evidence the mortgaged premises were not the separate statutory estate of complainant. The deed of the property to plaintiff was made in 1865; and the mortgage, executed by herself and her husband jointly, was made in September, 1867, before the constitution of that year was framed. The cause is, therefore, not affected by section 6 of article 14 of that constitution. If that section is to be literally construed, and all the property of a married woman must “be and remain the separate estate of such female,” and may be only “*devised or bequeathed* by her,” and not conveyed or alienated during her life and marriage, she might be rich in unimproved and unproductive real estate, and yet starve, because unable to sell any of it in order to improve the rest, or to raise money by which to feed herself and children. But that constitutional provision does not affect this cause.

1. In the second paragraph of her bill, plaintiff says that the mortgaged land “was conveyed by John H. Herbert and wife, to the *sole and separate use* of your oratrix.” And the deed, to which she refers, and which is exhibited, does convey it to her for her sole and separate use. This is a “separate estate in its broadest sense;” by contract, by the conveyance through which she acquired it.—*Ozley v. Ikelheimer*, 26 Ala. R. 332; *Oliver v. Friend*, 27 Ala. 532;

Caldwell v. Pickens, Adm'r, 39 Ala. 514; *Cuthbert v. Wolfe*, 19 Ala. 376; *Cannon v. Turner*, 32 Ala. 483.

And it has been so repeatedly held, and the supreme court, in *Cannon v. Turner*, (*supra*,) said: "After the most careful consideration, we decided, in *Pickens and Wife v. Oliver*, (29 Ala. 528,) that the provisions of article 3, chapter 1, title 5, part 2, of the Code, relate to and provide for estates of married women which are made separate by operation of law; estates created by descent, gift, or in some other manner, without words, which would have created a separate estate, before our statute on the subject; and not to estates which, independent of legislation, would have been separate by the operation of the instrument or contract creating them." The court then refers to several other cases in which it was so held.—32 Ala. 485.

And it makes no difference whether the "instrument or contract creating" the separate estate was executed before or after the adoption of the Code. This very point arose in that case of *Cannon v. Turner*; and the court say that, held otherwise, "we must make an arbitrary and senseless discrimination in the effect of the same words, when applied to instruments of different dates."—*Ib.*

The learned judge might have added, moreover, that if by the act of 1850, or by the Code, the legislature intended to abolish for the future, the long known and well established separate estates of married women, which had for hundreds of years been the subject of equity jurisdiction, it would certainly have done so in express terms. It was not, in those enactments, dealing at all with these estates. On the contrary, it was dealing with the estates (and those estates only) which husbands got by marriage in the property of their wives, respectively, when not secured to the latter as their separate property by contract, or the instruments conveying it. The common-law rights of the husband in such property of the wife were restrained and changed by statute, and thenceforth such property became the *statutory* separate estate of the wife, to be disposed of only as the statute prescribed or authorized. "It is to be

presumed, as a general rule, that if it is the purpose of the general assembly to overturn a whole system of legislation upon a distinct and important interest of the State, and abandon it, it will be done by some direct and positive measure, and not by indirection or implication."—By PETERS, J., in *Horton, judge, &c., v. Mobile School Commissioners*, 43 Ala. 604.

Not only did the legislature not interfere with the separate estates of married women, or the existing laws relating to them, but the able and thoughtful men in it must have considered that, in numberless instances, it would be best that the old equity doctrine concerning such separate estates should continue in force; and that the person from whom property might come to a married woman should have power to prescribe, by the terms of the deed, whether it should or not be to her "a separate estate in the broadest sense," to use the language of the court in *Warfield v. Ravesies and Wife*, (38 Ala. 523.)

By the law relating to the "statutory separate," the rents, income and profits may be disposed of by the husband without liability to account therefor to the "wife, her heirs, or legal representatives."—Rev. Code, § 2372. Might not a father or brother naturally prefer to make a gift to his daughter or sister according to the old law, by which the rents, income and profits would belong to her, to be disposed of as she should desire? Many a woman has more prudence and strength of character than her husband. Why should not her kindred, knowing this, have a right to entrust to her control property intended for her benefit? Having such right, why should not a deed, made in the old and long approved form for that purpose, be the proper mode of exercising the right?

Furthermore, if a married woman, having a statutory separate estate, "die intestate, leaving a husband living, he is entitled to one-half of the personalty of such estate absolutely, and to the use of the realty during life;" the whole of the realty.—Rev. Code, § 2379. And this, though she may leave half a dozen children by a former husband,

and none by the husband surviving her; and this, whether the husband had reduced the property into possession during the coverture or not.—*Marshall v. Crowe's Adm'r*, 29 Ala. 278. As wills are generally put off to a time when death seems to be approaching, it is easy then for a husband, without its being known, to prevent his feeble wife from making one. But property conveyed to the wife by a deed like the one now under consideration, according to the doctrine heretofore always taught in respect to such instruments, would not, on her death without a will, pass to her husband in exclusion of her children.—*Willis v. Cadenhead*, 28 Ala. 472.

It was, therefore, well held, as it has been repeatedly by the supreme court, that the law in relation to "separate estate of a wife, in its broadest sense," was not abrogated or impaired by the acts of 1848 and 1850, or by the Code. The courts might not be so astute afterwards, to interpret doubtful words so as to create a separate estate by contract.—*Carrington & Co. v. Manning's Heirs*, 13 Ala. 625-6. But when such estate is created, the courts will recognize and uphold it. ✓

2. It is hardly necessary to add, that a wife having such a separate estate may charge it by mortgage or otherwise, even for the debt of another.—*Ozley v. Ikelheimer*, 26 Ala. 332; *Gunter v. Williams and Wife*, 40 Ala. 561; *Molton v. Martin*, 43 Ala. 654.

3. As the decisions on this subject constitute rules in regard to title to property, which have since been acted on, they ought not now to be overruled if they were erroneous. This has been often held in Alabama; and in the great case of *The Propeller Genessee Chief v. Fitzhugh*, (11 How. 448,) in which the supreme court of the United States reviewed and overturned its former decision in the case of *The Thomas Jefferson*, and in other cases, concerning the extent of the admiralty jurisdiction, that court says: "The case of *The Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have

felt ourselves bound to follow it, notwithstanding the opinion we have expressed" [that it was erroneous]. "For every one would suppose that after the decision of this court in a matter of that kind, he might safely enter into contracts on the faith that rights thus acquired would not be disturbed. In such a case, *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to. For, if the law as pronounced by the court ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it."

This is the wise doctrine of the highest court in this land, or perhaps in the world. And it must be the doctrine of all courts that will not suffer themselves to be used as traps for the ruin of those who put trust in them.

Who can tell how many prudent men have taken conveyances and mortgages, and how many learned lawyers have advised the taking of them, in the faith that what the supreme court of Alabama had decided in respect to such deeds as that to Mrs. Berrey, the same court would continue to hold until the legislature should change the law for the future?

4. It is not to be forgotten that the Code, without change so far as this cause is concerned, has been adopted with a knowledge on the part of the legislature of the interpretation given by the courts of the portions under consideration. And such re-enactment is a re-enactment with that interpretation.—*Duramus v. Harrison*, 26 Ala. 326; also, 29 Ala. 355.

5. Plaintiff's counsel predicate the right to a decree on the late cases of *Bibb v. Pope*, (43 Ala. 190,) and *Molton v. Martin*, *ib.* 651.

In the former, Judge PETERS takes pains to show that by the conveyance to Mrs. Pope no "separate estate" was created; but that a statutory separate estate in her was created by the Code; and that the only question was "whether her statutory separate estate was liable to be sold" under the mortgage which she signed jointly with her husband, to secure payment of the debt of the hus-

band. "This question" (he adds) "has not heretofore been settled by any decision of this court."—Pp. 197–8.

And the court correctly decides that the mortgage (which the mortgagee knew was taken to pay a debt of the husband) was not valid. The decision is not only not opposed to any other of the supreme court, but is in harmony with some of them.

In *Warfield v. Ravesies and Wife*, (38 Ala. 523,) the supreme court held that the act of 1850, incorporated in the Code, in respect to property of married women, and giving to them a power of disposition, was an enabling statute; and that the power conferred must be exercised only in the mode prescribed by the statute. Therefore, by simply signing a note with her husband for the payment of money, the wife did not charge her statutory separate estate. A deed of it must be duly executed.

So, as the law makes the proceeds of a sale of the property, like the property itself, the separate estate of the wife, to be invested or employed for her benefit, (and it is only for this purpose that a sale of the property is authorized to be made,) a person who should take a deed of sale, however correct in form, to himself, of the statutory separate estate of the wife, in payment of a debt of the husband to him, or for a price which he knew was to be appropriated by the husband to his own use, would not get a good title. The enabling statute did not authorize a sale to be made for that purpose. This is the principle on which the decision in *Bibb v. Pope* is really and expressly founded, and not on the fact that the deed was a mortgage deed instead of a deed of absolute sale.

The power to sell, to raise money to be invested for the benefit of the wife, confers the power to mortgage for the same purpose.

In the case of *Bell v. Harris*, (4 Myl. & Cr. 264,) on appeal from the vice-chancellor, Lord Chancellor Cottenham, affirming his decree, says, (pp. 267–8): "The third point is equally untenable, viz., that the right of the trustee to sell did not authorize the mortgage. So long ago as the case

of *Mills v. Banks*, in 1724, (3 P. W. 1,) it seems to have been assumed as settled that 'a power to sell implies a power to mortgage, which is a conditional sale'; and no case has been cited throwing any doubt upon that proposition."

Much more should that be so where trustee and *cestui que trust* join in the deed of mortgage, and it is made for the benefit, as prescribed, of the *cestui que trust*.

There is nothing in *Bibb v. Pope* (which relates, as we have seen, exclusively to a statutory separate estate,) adverse to the defendants in this cause.

Nor does the case of *Molton v. Martin*, (43 Ala. 651,) affect this cause. Notwithstanding some ambiguity in the language of the judge, the court held only that property bought with the proceeds of the statutory estate of a married woman, became also her statutory separate estate, although the deed conveying it to her expressed that it was for her sole and separate use; because the husband and wife can not convert her statutory separate estate into a separate estate by contract. Compare opinion with the argument of appellant, p. 653.

In this cause, the property of Mrs. Berrey was not bought with money of her statutory separate estate. She herself so testifies (on her first cross-examination): "Mr. Berrey bargained for the place and bought it. Mr. Berrey procured the deed to be made. I do not know who wrote the deed. The place *was paid for by Mr. Berrey with his money*. My brother accepted the drafts which were given in payment of the place, and paid them." And although, after this, Mr. Berrey is examined by plaintiff as a witness, her testimony remains unchanged, that the property was not bought with her money, but with his. It looks, indeed, as if the property was subject to the liabilities of the insolvent Mr. Berrey, without any act to be done by him or his wife, and might be properly sold to discharge them. It is wholly immaterial, however, whose money paid for the property, if Mrs. Berrey's did not. Whether paid for by the money of Mr. Berrey, (as she testifies,) or of her brother, (as al-

leged in the bill of complaint,) is a circumstance which does not affect the construction or operation of the deed.

In any aspect of this cause, it would seem that the bill of plaintiff must be dismissed, unless it be held that the husband and wife may profit by deceiving those with whom they deal, and the decisions of the highest court of the State, constituting rules of property, are to be recklessly overturned.

III. If the appellees (plaintiffs below) were entitled to a decree, it would still be error to require the promissory note to be delivered up and cancelled; for John C. Berrey would continue liable upon it.

IV. Nor would she be entitled to full rent, without abatement for needed repairs, for taxes paid, and for other expenses.

BEN LANE POSEY, *contra*.

[No brief on file.]

PETERS, J.—The question of primary importance in this cause, is the title of Mrs. Berrey to the property in dispute. If it is a separate estate, governed by the statute securing to married women their separate property, then the difficulty is easily solved; but if it is an estate held by some other tenure, which frees it from the limitations of the statute, then a different rule of law must apply.

Mrs. Berrey is a married woman and a citizen of this State, and her husband is still living. She was married in 1849. The land in controversy was conveyed to her “for her sole and separate use and benefit,” on the 12th day of August, 1865, by deed of that date. This land is situated in this State, and the deed to her purports to have been made in this State. Her property in it has, therefore, accrued since the passage of the statutes digested in the Code, regulating the estate of the wife. The Code went into operation on the 17th day of January, 1853.—Pamph. Acts 1853–54, p. 87. The first enactment upon the subject of “securing to married women their separate estates,” in

this State, was approved on the 1st of March, 1848. The first section of this act shows very clearly the legislative purpose. It is in these words: "That if any married woman, before and at the time of marriage, shall *have and own any property or estate*, whether the same be real, personal or mixed, in possession, remainder or reversion, or if *any such estate* shall, after marriage, by descent, gift, demise, or otherwise; accrue to any woman, *all such estate and property* shall be taken, held and esteemed in law as the *separate estate* of such woman; and no husband shall, by his marriage, acquire a right to the property which his wife had upon his marriage, or which she may after acquire by descent, gift, demise, or otherwise, except as is hereafter provided for."—Pamph. Acts 1847–48, p. 79, No. 23. This language was copied into the first section of the act of the general assembly of this State, entitled "An act to alter and amend the act *securing* to married women their separate estates, and for other purposes, approved March 1st, 1848," which amendatory act was approved February 13, 1850.—Pamph. Acts 1849–50, page 63, No. 23, § 1. These two sections of these two important statutes are identically the same in language, as will be seen on comparison. The act of February 13, 1850, repealed all laws and parts of laws in conflict with its provisions.—Section 11. The language of the first section of this latter act is condensed in the Code of Alabama in the following terms: "ALL PROPERTY of the wife, *held* by her previous to the marriage, or *which she may become entitled to* after the marriage, *in any manner*, is the *separate estate* of the wife, and is not subject to the payment of the debts of the husband."—Rev. Code, § 2371; Code of Alabama, § 1872. This language is but a synopsis and condensed statement of the section of the act last above referred to. The words "*all property*" take the place of the words "*all such estate and property*," used in the original act and the amended act. These words are as broad as the language can make them. They include every thing that can be owned.—*Jackson v. Housel*, 17 John. 281, 283, (marg.); *Morrison v. Semple*, 6 Binn. 94; *Doe, ex*

dem. Ward, v. Langland, 14 East, 370; *Soulard v. United States*, 4 Pet. 511; *Jackson v. Robins*, 16 John. 537, 587, (marg.); *Lambert's Lessee v. Paine*, 3 Cres. 97, 128. And the words "in any manner" refer to the title; that is, to the manner of the holding, and the manner of becoming entitled to the property. "In any manner," in such a connection, means "in every manner." It includes every possible title upon which a claim to property can be supported. Wherever the wife had a right of property, or became entitled to a right of property, the statute intended to "secure" it to her, "as her separate estate," under "the provisions" of the Code.—Rev. Code, §§ 2382, 2388. There can be no doubt of the legislative authority to pass such a law in relation to all future acquisitions of the wife. That is the case here. The property in controversy has been acquired by the wife since the promulgation of the Code; and it is *held* under that system. Since the Code, the words creating a separate property in the wife are mere surplusage. This would be the effect of the deed without such words. They do not add to the force of the title, and they can not vary the wife's rights under the law. The law enters into the title and controls it, where the title *in any manner* passes to *her*, in her own name. To me, the language and purpose of the statute is clear and free from doubt. And I have reluctantly yielded my assent to the conclusion, that it does not govern all estates in which the wife has an interest, to the extent of her "estate," at least, whether the property be conveyed directly to her, in her own name, or to a trustee for her use. Her rights of property in the one instance, as well as the other, need to be "secured" and protected. The law for this purpose covers *all her* property. And her property in this State is not to be condemned for her husband's debts. As a married woman, she holds all her estate and property "subject to all the rules, regulations and limitations" contained in the Code, after that system of law went into operation.—Rev. Code, §§ 2382, 2388. That this statute is free from constitutional objection, I think has never been doubted. Our

statute has existed for above twenty-three years, and it has never been assailed as wanting in constitutional validity, in any case known to me. Such laws are now common in almost, if not quite, all the States of the Union; and the legislative power to pass them is every where admitted, so far as future acquisitions are concerned.—1 Kent, 455; *Nerrill v. Sherburne*, 1 N. H. 213; Smith on Stat. and Con. Constr. 412; Cooley on Const. Law, 360, 361, ed. of 1868; *Glenn v. Glenn*, January term, 1872; *Moulton v. Martin*, 43 Ala. 651. This exposition of the law governing the separate estate of the wife necessarily brings the estate of Mrs. Berrey in the lands in controversy in this suit under its provisions. In this view of the case, she could not bind herself by the mortgage, either for her husband's or her own debt, contracted since the Code was promulgated, in the manner that has been attempted in this case.—*Wilkinson et al. v. Cheatham et al.*, 45 Ala. R. 337; *Bibb v. Pope*, 43 Ala. 190; *Warfield v. Ravesies and Wife*, 38 Ala. 518.

The decree of the learned chancellor in the court below was, therefore, correct, and it must be sustained.

The decree of the court below is affirmed, and the appellants will pay the costs of this appeal in this court and in the court below.

NOTE BY REPORTER.—At a subsequent day of the term, appellant applied for a rehearing, and filed in support thereof the following argument:

Motion is made for a rehearing in this cause, on two points which have not been the subject of consideration by the court.

The record shows that John C. Berrey, the insolvent husband of Mrs. Berrey, (and who certainly did, if Mrs. Berrey did not, get the money of Mrs. Denechaud,) himself bought and caused to be paid for out of his own money, the land in controversy, which he procured to be conveyed by Herbert and wife to Mrs. Berrey, and which Berrey and wife mortgaged to Denechaud to secure the repayment of that money.

Mrs. Berrey herself says in her first deposition, "I did not obtain the money with which the land spoken of * * * was bought. * * It was not bought with my money. The money was not given to me at all. It did not pass through my hands; but the place was bought by Mr. Berrey and deeded to me."

And in reply to first interrogatory at same time, Mrs. Berrey says: "Mr. Berrey bargained for the place and bought it. Mr. Berrey procured the deed to be made. The place was paid for by Mr. Berrey, and *with his money*. My brother accepted the drafts which were given in payment for the place, and paid them;" but, as she says, with Mr. Berrey's money.

This testimony was given in presence of her father, who was examined at the same time, and on the same interrogatories and cross-interrogatories, each alternately, first on the former, and then on the latter; and although her husband and she again, several months afterwards, were examined, no contrary evidence was given; and there is no pretense that this evidence is not correct. Now, the *money of this insolvent man being invested in this land*, and it being mortgaged by both husband and wife to secure the payment of the money borrowed by both upon a note signed by both, will not the court require those who seek equity also to do equity? Will a court of equity actively aid them to get back the land, except upon the condition that they will pay back the money they received, and the taxes and cost of repairs? To require them to do this, in favor of the unfortunate Mrs. Denechaud, who is now left almost penniless, does not interfere with the point chiefly established by the court, but requires the plaintiff to do equity on the condition of receiving the aid of the court.—1 Story's Eq. Jur. § 64e.

2. The decree of the chancellor affirmed by this court directs that the note signed by Berrey himself, as well as by his wife, shall be cancelled and delivered up; and so that no recourse shall be had against John C. Berrey even. This surely can not be intended by the court.

Again, Mrs. Denechaud has been paying taxes, insurance, cost of repairs, &c., as set forth in the answers; yet, the decree referring it to the master for an account of the rents, does not instruct or authorize the register to make any allowance for these things.

At the succeeding term, the application was denied.

LONG vs. BAKEFIELD.

[APPEAL FROM JUSTICE'S COURT—JURISDICTION, &c.]

1. *Justice of the peace, jurisdiction of, test of.*—The test of the jurisdiction of the justice's court is the amount of the plaintiff's demand in controversy, and not as affected by offsets.
2. *Same; objection to jurisdiction of; how made.*—An objection to the jurisdiction of the justice in respect to the amount in controversy must be taken by demurrer or plea in abatement. The plaintiff can not be nonsuited because the proof develops a larger sum due him than he has claimed.
3. *Recovery, amount of; how arrived at where offset is proved.*—Where, on appeal to the circuit court from the justice's court, the proof shows a larger sum due the plaintiff than is claimed in his complaint, and the defendant proves a set-off less than the amount of plaintiff's claim, the measure of recovery is the sum left after deducting the amount of the set-off from the amount claimed, and not from the greater amount proved to be due the plaintiff.

APPEAL from the Circuit Court of Chambers.

Tried before Hon. LITTLEBERRY STRANGE.

This was an action commenced by attachment sued out by the appellee against the appellant before a justice of the peace. The papers sent up in the case by the justice to the circuit court, show that the justice rendered a judgment in favor of the appellee for the sum of sixty-eight 50-100 dollars; but the amount claimed before the justice

no where appears in any of the proceedings had before him. The bill of exceptions reserved in the circuit court commences as follows: "Bakefield vs. Long. Circuit Court, Spring term, 1871. Appeal from justice's court. Suit by attachment for \$99 00." And this is the only statement in the record showing the amount of the appellee's demand before the justice.

In the circuit court, appellee filed a complaint containing two counts, the first claiming \$100 due by account, and the second a like amount for work and labor done, &c.

Long pleaded *non-assumpsit*, payment, and set-off, and the trial was had in the circuit court on issue joined on these pleas.

It appears, from the bill of exceptions, that Long asked for a continuance when the case was called for trial, on the ground of the absence of a witness who would prove a set-off; and the plaintiff then admitted that this witness would "prove" a set-off of \$28 50. The plaintiff was then introduced as a witness in his own behalf, and "proved" that at the commencement of the suit defendant was indebted to him in the sum of one hundred and seven dollars for work and labor done, &c.; and this was all the evidence in the case. The defendant then "moved the court to nonsuit the plaintiff, because the evidence showed that plaintiff's claim was, at the commencement of the suit, above a justice's jurisdiction, and no credit had been given to bring the claim within the justice's jurisdiction. This motion the court overruled, and the defendant excepted.

The court, at the request of the plaintiff, charged the jury, to deduct the set-off proved from the sum of \$107, and the difference would be the proper measure of damages, &c. To the giving of this charge, defendant also excepted.

The defendant then requested the court to charge the jury, that the plaintiff could not recover more than he sued for, and that \$99 00 was all that was claimed at the commencement of the suit, and that the amount left from this sum, after deducting the amount of the set-off, would be

the amount of plaintiff's recovery. The court refused to give this charge, and the defendant excepted.

The defendant appeals, and here assigns for error—

1st. Overruling the motion to non-suit the plaintiff.

2d. The charge given at plaintiff's request.

3d. The refusal to give the charge requested by the defendant.

E. G. RICHARDS, for appellant.

BARNES & DENSON, *contra*.

B. F. SAFFOLD, J.—The test of the jurisdiction of the justice's court in civil cases is the amount in controversy, or the sum claimed.—Const. Art. 6, § 13; Rev. Code, 841. If, on appeal to the circuit court, the defendant would make a question of the jurisdiction in this respect, he must do so by demurrer or plea.—*Vaughan v. Robinson*, 20 Ala. 229; *Rose v. Thompson*, 17 Ala. 628. The plaintiff can not be non-suited, because, after issue joined on the merits, it is developed by the evidence that the amount really due him is beyond the lower jurisdiction. He has claimed only the proper amount, or the defendant is in fault for not having taken the objection at the proper time.

The court erred in instructing the jury to deduct defendant's offset from the amount proved to be due to the plaintiff, without regard to the sum claimed by him, or of which the justice had jurisdiction.—1 Chit. Plead. 339.

While a plaintiff may bring his suit within the cognizance of the justice by voluntarily releasing a portion of his demand, he can not do so by admitting offsets. It is the plaintiff's amount in controversy that determines the jurisdiction, and not as it may be affected by independent demands of the defendant. Such a practice would lead to confusion, and embarrass the right of the defendant to be heard in a higher tribunal.

Excepting the limits of the concurrent jurisdiction of the circuit court and the justice, a case within the jurisdiction of one is without that of the other. Section 2768 of the Revised Code requires the suit to be dismissed from the

circuit court, when the sum recovered is less than the jurisdiction, unless it is reduced to that amount by an offset successfully made.

The judgment is reversed, and the cause remanded.

BATES, ADM'R, vs. RIDGEWAY.

[UNLAWFUL DETAINER.]

1. *Tortious possession; when may be basis of action of unlawful detainer.*—A tortious possession of land may become lawful by agreement of the parties, express or implied; and in that case, unlawful detainer will lie to recover the possession, upon demand in writing, after the termination of such lawful possessory interest.
2. *Unlawful detainer; secondary evidence of demand in writing, when admissible.*—In an action of unlawful detainer, secondary evidence of the demand in writing can not be received until the proper predicate has been laid for its introduction.
3. *Notice to produce demand in writing; when not sufficient.*—In such action, a notice to produce the written demand, given by the plaintiff to the defendant's counsel at the trial, is not sufficient in point of time, without proof that the paper is in court, or so near that it can be obtained without delaying the trial. There is no presumption that the defendant or his counsel has it in court.

APPEAL from the Circuit Court of Dallas.

Tried before Hon. M. J. SAFFOLD.

This was an action of unlawful detainer, commenced in the year 1861 before a justice of the peace. Judgment having been rendered in that court against the appellant, Ridgeway, he appealed to the circuit court.

The appellee, as plaintiff, complained, in substance, that the defendant Ridgeway entered upon the premises described, of which he had the possession, without his knowledge or consent. But after such entry, the plaintiff allowed him to remain there, for the purpose of completing

Bates, Adm'r, v. Ridgeway.

an unfinished dwelling house situated on the premises; that the defendant did not claim to hold adversely, but recognized the plaintiff's title and possession, and remained there engaged in completing the dwelling with materials furnished by the plaintiff; that after the completion of the house, and before the commencement of the suit, the plaintiff demanded the possession of the said premises in writing, &c., but the defendant refused to surrender the same to him. A demurrer to this complaint, the grounds of which are not stated, was overruled.

On the trial, the plaintiff introduced a witness, who was plaintiff's agent in the transaction, to prove the allegations of his complaint, who, after testifying as to the plaintiff's possession, defendant's entry, &c., as stated in the complaint, "proved that there was a custom in Selma, where the house was situated, that the rent year, when there was no contract, expired on the first day of October of each year;" and that defendant completed the house mentioned before October 1st of the year in which demand was made.

This witness was asked if any demand in writing for possession, &c., had been made before commencement of the suit; whereupon, defendant objected to the question being answered, as it called for oral proof of the contents of a written instrument. The witness then testified, that at the time the written demand was made, the plaintiff gave the writing to the defendant; and, thereupon, the plaintiff notified the defendant's counsel to produce said writing to be read in evidence before the jury. Defendant's counsel declined to produce the writing, because he did not have the writing, and had never seen it, and had not had reasonable notice to produce it. The court, against the defendant's objection that no proper predicate had been laid for such testimony, then permitted the plaintiff to prove "that more than six days before the commencement of this suit, he demanded possession of the premises sued for from defendant, in writing, and delivered the writing to the defendant at the time;" to which ruling of the court the defend-

ant duly excepted. This was the substance of the testimony.

The court charged the jury, that "if they believed from the evidence that the plaintiff's agent agreed with the defendant, after he had taken possession of the lot, that he might complete the house, and allowed him to retain the possession of it for that purpose, that then this was just as much a renting as if the agent had made a regular contract in writing with him." The court also charged the jury, that the plaintiff was entitled to recover, if they believed from the evidence that he had proved the allegations of the complaint set out above.

To each of these charges the defendant excepted. The rulings of the court to which exception was reserved are now assigned for error.

JOHN WHITE, for appellant.

J. HARALSON, *contra*.

B. F. SAFFOLD, J.—As the objection to the complaint is not specified in the demurrer, we have only to consider whether it contains a special cause of action. The defendant's entry into possession of the land was not lawful. It was a trespass. The parties, however, were competent to waive the tort, and in that case *assumpsit* would lie for the use and occupation, which is not maintained when the defendant's possession is tortious, or adverse.—1 Chit. Plead. 107; *Stockett v. Watkins*, 2 Gill & Johns. 326; *Curtis v. Treat*, 8 Shepley, 525.

If it is true that the defendant recognized the plaintiff's rights of title and possession, and remained on the premises, doing valuable work for him, and obtaining from him the materials to perform it with, the law will understand that there was an agreement between the parties, either express or implied, which rendered the defendant's possession neither tortious nor adverse, but lawful.—*Waugh v. Ridgeway*, 42 Ala. 368; *Rainey v. Capps*, 22 Ala. 288. The demurrer was properly overruled.

We adhere to the rule declared in *Dumas v. Hunter*,

Bates, Adm'r, v. Ridgeway.

(30 Ala. 75,) that secondary evidence of the demand in writing, which is indispensable to the maintenance of this action, can not be received, until the proper predicate has been laid for its introduction. The statute (Rev. Code, § 3300,) requires an unequivocal demand in writing, the sufficiency of which the court may determine. It may not be left with the defendant, and thus the proof might depend entirely on oral testimony, to the defeat of the law. A conditional request, or ambiguous expression, might be converted by imperfect remembrance into a formal and imperative demand. The plaintiff must prove that the defendant is a wrong-doer.

The authorities conflict on the question, whether notice to produce a writing which is in the possession of the opposite party or his attorney in court, or so near that it can be obtained without delaying the trial, is sufficient when given after the trial has commenced. It would be obviously unreasonable to compel a party or his attorney to leave the court in quest of papers, when perhaps during the interval the cause may be reached. But is certainly incumbent on the party desiring the paper, who gives notice for its production after the trial has commenced, to show by direct evidence, or clear presumption, that it can be obtained without delay. In this case, he failed to do so, because the defendant's counsel denied that he had it, or knew anything about it, even if any presumption be admitted. There was, however, no necessity for the defendant to have the paper with him, if it was a proper demand. 4 Phil. Ev. (Cow. & Hill's Notes), 416-18; *Utica Ins. Co. v. Caldwell*, 3 Wend. 296; *Gorham v. Gale*, 7 Cowan, 739. The court erred in admitting the secondary evidence.

The charges of the court which were objected to were nothing more in effect than a repetition of the judgment on the demurrer.

The judgment is reversed, and the cause remanded.

HUMES, ADM'R, vs. FARISS, ADM'R.

[BILL IN EQUITY FOR ACCOUNT, &c.]

1. *Bill in chancery to enforce agreement, &c. ; what will be dismissed.*—D., in his life-time, bought land of S., and died leaving part of the purchase-money due and evidenced by promissory note; S. made title to D., but retained a vendor's lien with his note. After D.'s death, F. was appointed his administrator, and as such he obtained an order of court to sell the land. Steele then proposed to set up his lien and give notice of it to the purchaser under the sale by F. But F., fearing that this would injure his sale under the order of court, agreed in writing with S., that if S. would abandon his lien and allow the land to be sold free of the lien, then F. would appropriate so much of the purchase-money derived from the sale under the order of court, as might be necessary, for the payment of S.'s note for the purchase-money due him from D.'s estate. S. accepted this agreement of F. as the administrator of D., and abandoned his lien on the land, and they both agreed in written agreement to that effect. The land was sold free of the lien, under the order of court, by F. as the administrator of D., for a much larger amount than S.'s note; but after the sale, F. refused and failed to comply with his agreement with S.,—*Held*, 1st, that on a bill by S. against F. as the administrator of D., to compel an appropriation of a portion of said purchase-money in F.'s hands for the payment of S.'s note, the suit could not be entertained against F. in his representative character; as F. could not, in this way, bind the estate of D. by such an agreement with S.; and after the lien was abandoned, no bill could be filed to enforce it; 2d, that such an agreement between F. and S. is the personal contract of F., and not his contract as administrator of D., and can not bind the estate; 3d, that on the breach of such an agreement, F. may be sued at law, where the remedy is without uncertainty or embarrassment.

SAFFOLD, J., (*dissenting*,)—*Held*, that when, by agreement with the administrator of his vendee, the vendor omits to give notice of his lien at a sale of the land as the property of the decedent, under order of the probate court, in consideration of the administrator's retention of the money subject to his lien if established, a trust in his favor attaches to the money in the hands of the administrator when it can be identified.

APPEAL from the Chancery Court of Madison.
Tried before Hon. WM. SKINNER.

Humes, Adm'r, v. Fariss, Adm'r.

The facts of the case may be stated as follows:

On the first day of January, 1861, Matthew Steele, under the power vested in him as executor of the last will and testament of George Steele, deceased, sold a store-house and lot in the city of Huntsville, to John S. Dickson, for the sum of \$6,500, which was to be paid in three equal installments. Two of these installments were paid, but at what time is not stated. For the remaining installment, Dickson executed a promissory note, of which the following is a copy:

"\$2,166 66. Huntsville, Ala., Jan'y 1st, 1861.

"On the first day of January, 1863, I promise to pay M. W. Steele, ex'r, or order, twenty-one hundred and sixty-six dollars and sixty-six cents, with interest from January 1st, 1861, value received.

"JOHN S. DICKSON."

Endorsed on this note was the following: "Presented, April 10th, 1867. John M. Fariss, adm'r John S. Dickson."

On the 7th of March, 1863, Steele conveyed the legal title to the house and lot to Dickson, acknowledging in the conveyance full payment of the purchase-money, but in fact retaining a vendor's lien for said note, which it is alleged is outstanding and unpaid.

Dickson died intestate in November, 1864. On the 6th day of June, 1866, letters of administration on his estate were granted by the proper court to appellee, who duly qualified, &c. Afterwards, on report of insolvency, made by appellee, said estate was, on the 17th day of July, 1867, duly declared insolvent, and appellee continued in its administration. On the 16th day of December, 1867, appellee, pursuant to a proper order of sale obtained for that purpose, sold said house and lot to W. M. Holding and Walter Fletcher for \$6,005. This sale would seem to have been made for cash, though there is no positive averment on that point.

It is further alleged in the bill, that appellee Fariss, previous to the sale to Holding & Fletcher, hearing that Steele

Humes, Adm'r, v. Fariss, Adm'r.

“proposed to give notice of his vendor’s lien on the store-house and lot,” and fearing the effect thereof on the sale, “desired and requested” Steele “to let it be sold free from his lien, and the purchase-money thereof be substituted in place of the lot, subject to all” Steele’s “lien rights and remedies for enforcing them which” Steele “had on the lot itself before the sale thereof; and in consideration of” Steele’s “allowing said lot to be sold free of his lien, Fariss entered into a written obligation to retain and appropriate so much of the purchase-money as might be necessary to the payment of such balance as might be ascertained to be due on said note, and decreed as a lien by the chancery court.”

This written obligation was as follows:

“The State of Alabama, Madison county. Whereas, Matthew W. Steele, executor of George Steele, deceased, holds a promissory note of which the following is a copy, viz: [Here follows a copy of said promissory note as hereinbefore set out,] “which he says was given for an installment of the purchase-money for a store-house and lot in the city of Huntsville, in said county, sold by him as executor of the will of George Steele, deceased, to John S. Dickson, and for the payment of which he claims a vendor’s lien upon said lot described in his deed of conveyance therefor to said John S. Dickson, dated March 7th, 1863; and whereas, I, as administrator of the estate of said John S. Dickson, deceased, pursuant to an order of the probate court of said county, propose to sell said lot this day, and hearing that said M. W. Steele proposes to give notice of the lien claimed by him, and being apprehensive of the effect of such notice on the sale, and claiming as such administrator to hold offsets to, or credits on, said note, and that there is nothing due on said note, and that said Steele has no lien, and requesting and desiring said M. W. Steele to let said store-house and lot be sold free from his alleged lien, and let the purchase-money be substituted in place of the lot itself, subject to all the lien rights and remedies which he had on or against the lot before the sale.

Humes, Adm'r, v. Fariss, Adm'r.

"Now, therefore, in consideration of the premises, and in consideration that said M. W. Steele allows said store-house and lot to be sold free from his claim or lien, I agree to hold and appropriate as much of the purchase-money as may be necessary to the payment of whatever balance may be ascertained to be due and decreed as a lien on said lot, or the purchase-money thereof, by the chancery court.

"JOHN M. FARISS,

"Adm'r of John S. Dickson."

The bill was filed on the 22d day of February, 1868, and against appellee, solely in his representative character as administrator of Dickson. The prayer of the bill was that an account be taken of what is due complainant on said promissory note for the purchase-money, and that so much of the proceeds of the sale by Fariss to Fletcher & Holding as may be necessary, be applied to the satisfaction of the debt, &c., and for general relief.

Pending the suit, Steele was removed, and Donegan and Humes were appointed administrators with the will annexed, and afterwards, Donegan having died, the cause proceeded in the name of Humes alone.

Fariss answered and demurred to the bill. The answer did not controvert in any material feature the statement of facts made in the bill, with the exception that it denied that any thing was due on the note, and set forth with particularity the various matters depended on as offset to the note, &c. Fariss in his answer admits that "he now has the money for which the property was sold, and if complainant shall be able to establish any lien, he (Fariss) will pay it out of that money." There was also some testimony taken by the parties, but it is not necessary to allude further to it, or to Fariss' answer, in the view which this court took of the case.

The grounds of Fariss' demurrer were—

1st. Want of equity.

2d. That it appeared from the bill that Dickson's estate was declared insolvent on the 17th day of July, 1867, and that the note sued on was not filed and verified against

said insolvent estate within nine months as required by law.

The cause was submitted for final decree on bill, answer and testimony, and the chancellor dismissed the bill, and taxed complainant with the costs.

It is now assigned as error—

1st. That the chancery court erred in dismissing the bill.

2d. In not decreeing payment of appellant's debt out of the proceeds of the sale of the house and lot.

CABANISS & WARD, for appellant.

ROBINSON & WALKER, *contra*.

PETERS, J.—This bill is not one to enforce a vendor's lien upon land. In this case, that has been released and abandoned, and the land has passed into the hands of innocent purchasers for a valuable consideration, who purchased the house and lot "free from" Steele's "claim or lien." This appears from the contract set out in the bill. The lien, then, is gone, so far as the land is concerned. Without the lien against the land, there can be no suit in chancery to collect the note. There is a clear and well ascertained remedy at law, if it is not barred, on the note by action of debt. When this is the case, equity will not take jurisdiction.—1 Story's Eq. § 25, *et seq.*; *McCullough et ux. v. Walker et ux.*, 20 Ala. R. 389; *Elliot v. Bank of Mobile*, 20 Ala. 345. There was, then, no remedy on the note in a court of equity, on the statement of facts presented in the bill. Does the contract between Steele and Fariss, which I suppose was executed some time about the date of the sale to Holding & Fletcher, to-wit, about December 16, 1867, help the case? I am constrained to say it does not. This is merely a written agreement upon certain considerations to pay a sum of money on the happening of certain events. It is not a mortgage, or a trust on the estate of Dickson. No one but Dickson himself could bind his estate by such an agreement. An administrator has no such authority. He is a trustee with limited powers.

Humes, Adm'r, v. Fariss, Adm'r.

He can neither waste the estate of the deceased, or charge it with new liabilities.—1 Williams on Ex'rs, p. 562, and notes, (Amer. ed. by Fish, 1859); *Willis' Adm'r v. Heirs of Willis*, 9 Ala. 330. The contract between Steele and Fariss did not bind the estate of Dickson, but only Fariss individually; and its breach created only a personal obligation on Fariss to pay whatever damages such breach might have occasioned. And for the collection of the debt so contracted there is an ample and unembarrassed remedy at law.—*Wade v. Pope et al.*, 44 Ala. R. 690; *Jones v. Dawson*, 19 Ala. 672.

It also appears from the record, that the bill in this case was filed after the estate of Dickson was declared insolvent. It could not, then, be filed to enforce collection of Steele's notes against the estate of Dickson, but only to enforce the lien dependent on the note. But this lien was released by the contract above set out, and the equity of the bill could not rest on this lien. It was not to follow a trust fund which had gone into the hands of Fariss as the administrator of Dickson's estate; because he could not thus create a new liability against that estate. Nor does it appear to me, that the bill is so framed as to bring the relief sought within the principle laid down in *Coopwood v. Wallace*, (12 Ala. 790). If there is any party to the agreement between Steele and Fariss entitled to relief in equity, it is Fariss, after he may have paid whatever balance there may be due on Steele's note. But that would be a novelty not less trenching upon long settled principles of equity jurisdiction than the case of *Coopwood v. Wallace*, above cited.

There are other objections to the relief sought by the bill, which arose on the answer and proofs in the court below. But as these were not really questions in the case presented by the bill, they will not be discussed until they more directly arise.

A careful examination of the whole case, as presented by the bill, satisfies me that the learned chancellor's decree is correct. It is, therefore, affirmed, with costs.

SAFFOLD, J., (*dissenting*).—The decision of the court is rested on the proposition that a vendor of land with the lien is without equitable remedy, when by agreement with the administrator of his vendee, he omits to give notice of his lien at a sale of the property, as that of the decedent, under order of the probate court, in consideration of the retention of the purchase-money by the administrator subject to his lien, if established.

The administrator admits that he now has the money in possession. The only interest which the probate court did or could authorize the sale of, was the right which the decedent had in the land, subject to the prior incumbrances of other persons. The proceeds must be appropriated in the same manner as other assets; and neither the probate court, nor the court of chancery, has authority to direct their appropriation to the payment of the original purchase-money, in preference to other demands against the estate. *Vaughan & Hatcher v. Holmes' and West's Heirs*, 22 Ala. Rep. 593.

The lien of the complainant on the land being admitted, unless the debt had been paid, which the administrator affirmed, the latter was unwilling to prejudice the sale by notice of the lien for a large, but disputed amount. Is the administrator such a machine of the law and the probate court, that it was neither his privilege nor his duty to remove the obstacle to an advantageous sale? He could not go into equity himself, because he denied the debt, and the only inducement would have been to realize as great a sum for the estate as practicable. An unnecessary litigation of this sort would have been at his own expense. No consideration of public policy intervenes because the transaction was entirely for the benefit of the estate, and could not be otherwise. In *Vaughan v. Holmes*, (*supra*,) the court said that on account of the embarrassments likely to arise, it would be disposed to hold, but for former adjudications, that the probate court had no authority to sell inchoate equities. In that case the estate had not the legal title. In *Kirkman v. Benham*, (28 Ala. 501-6,) the very question

Humes, Adm'r, v. Fariss, Adm'r.

we are considering was suggested by the court without an expression of opinion.

Executors and administrators are, in almost every respect, considered in equity as trustees.—*Leavens v. Butler*, 8 Porter, 380. Where the estate is insolvent, they are the trustees of the creditors. Liens may be created on the purchase-money, due on the sale of an estate, in favor of a vendee, if it is agreed that the money shall be deposited in the hands of a third person, to be applied in discharge of prior incumbrances, to the extent of such incumbrances. Indeed, there is generally no difficulty in establishing a lien, not only on real estate, but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least, against the party himself, and third persons, who are volunteers, or have notice.—2 Story's Eq. Jur. § 1231. The original vendor may proceed against the land or the purchase-money in the hands of a subsequent purchaser for value without notice, if he has not paid. This is upon the ground, that where trust money can be traced, it shall be applied to the purposes of the trust.—2 Story's Eq. Jur. § 1232. Money, or other property, delivered by one person to another, to be paid or delivered over to and for the benefit of a third person, raises an implied trust in favor of such beneficiary. And if revocable, when it is revoked a trust results in favor of the party who originally created it.—2 Story's Equity Jur. § 1196.

From these recognized principles may be deduced that the incumbrancer may enforce the trust in favor of the vendee created by the deposit of the purchase-money; and that it is the receipt of the money for the purpose specified that gives rise to the trust against the party receiving it. This being the case, as Fariss received the money subject, by his agreement, to Steele's demand, he is undoubtedly trustee for Steele of that money, unless some one else has a better right to it. The estate of Dickson can not have a better right, because the purchaser would have been informed of the lien, and graduated his bid accordingly.

Humes, Adm'r, v. Fariss, Adm'r.

The administrator did not sell simply his intestate's interest, but the entire property with a perfect title. This he was enabled to do by the agreement. The estate was not entitled to any of the money until after the superior right was satisfied. The bill does not contemplate fixing any liability on the estate in consequence of the act of the administrator, but simply an ascertainment of what belongs to it. It is necessary, because without the intervention of equity, the fund must be distributed as other assets. The estate is insolvent; the administrator did not promise to do more than to retain the fund subject to the lien to be established against the land. If there is no trust, he is responsible personally to Steele without recourse on the estate. If he is insolvent, Steele must lose his claim. There is no recourse upon his sureties. Whose rights or interests are jeopardized that these results must follow rather than a trust be decreed.

To constitute a trust, there need only be a trustee and a *cestui que trust*. And there is no difference between a trust created by the deposit of money in the first instance, and one where the money is raised by the sale or conversion of property deposited with a trustee to convert into money. As long as the trustee holds it capable of being distinguished from his own money, the trust will be presumed to exist.—*Mawry v. Mason*, 8 Por. 211.

The complainant has proceeded against the administrator in his official capacity only. Perhaps it would have been better to have treated him as a trustee individually, and also to have made him a party officially to preclude the estate. But I do not know that it would. The fund is the subject of the suit, and it is indifferent into whose hands it is traced with notice of the trust. I think the decree ought to be reversed.

Troy, Adm'r, v. Ellerbe, Adm'r.

TROY, ADM'R, vs. ELLERBE, ADM'R.

[ACTION BY GUARDIAN APPOINTED DURING THE WAR, &C.]

1. *Case adhered to and reaffirmed.*—The case of *Bibb & Falkner v. Avery, Adm'r*, (45 Ala. 691,) adhered to and reaffirmed.
2. *Guardian appointed during war can not maintain suit in present State courts.*
A guardian appointed by the probate court of the rebel government having military control of this State in 1863, can not maintain an action as such guardian in the courts of this State, without a renewal of his appointment by the court of probate of the rightful State government.

APPEAL from the Circuit Court of Dallas.

Tried before Hon. M. J. SAFFOLD.

The court below, in this case, ruled that the plaintiff, who sued as guardian, &c., could not maintain an action as such by virtue of letters of guardianship issued by a probate court of the State during the late war, unless the letters had been renewed by a court of the present State government; and this ruling is now assigned for error.

PETTUS & DAWSON, and WATTS & TROY, for appellant.

BROOKS, HARALSON & ROY, *contra*.

PETERS, J.—There is nothing which separates this case in principle from the case of *Bibb & Falkner v. Avery, Adm'r*, decided at the June term of this court, (45 Ala. 691.) Upon the authority of that case, the judgment of the court below must be affirmed. A guardian appointed by a rebel court of probate, sitting under authority of the insurrectionary organization then having military control of this State, in 1863, can not maintain an action as such guardian in the lawful courts of this State, without a renewal of his appointment under the rightful State government, since the failure of the rebellion.

The judgment of the court below is affirmed.

GRESHAM ET AL. *vs.* THE STATE.

[APPEAL FROM JUDGMENT ABSOLUTE ON FORFEITED BAIL BOND.]

1. *Bail bond; what sufficient proof of execution of.*—On the rendition of judgment final against obligors on a forfeited bail bond, taken and approved by a justice of the peace, for the appearance of the principal at the circuit court, *scire facias* having duly issued to them to appear and show cause why judgment final should not be rendered, no further proof of the execution of the bail bond is required, where it is in proper form, than the bond itself, properly signed by the justice who took and approved it.
2. *Same; execution of, how denied.*—On appeal in such a case to the supreme court, the obligors can not object that no sufficient proof was made in the court below of the execution of the bond. If the obligors did not execute the bond, they should have set it up as matter of defense by proper plea in the court below.
3. *Same; judgment nisi; what should state.*—A judgment *nisi* on a forfeited undertaking of bail should state the offense for which the accused was indicted.
4. *Sci. fa.; what should state.*—A *sci. fa.* on such a judgment should set out the judgment, or recite it substantially.
5. *Indictment for murder; will sustain forfeiture of appearance to answer for manslaughter.*—An indictment for murder of a certain person will sustain a judgment of forfeiture on a bail bond requiring the accused to answer a charge of manslaughter of the same person.

APPEAL from the Circuit Court of Pickens.

Tried before Hon. L. R. SMITH.

The facts appear in the opinion.

M. L. STANSEL, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

B. F. SAFFOLD, J.—The appeal is from a judgment absolute on a forfeited bail bond.

On the 15th of March, 1871, the appellants entered into an obligation of bail, in the form prescribed by section 4239 of the Revised Code, for the appearance of William M. Gresham at the next term of the circuit court, to answer a charge of manslaughter. On the 16th of June, 1871, a

scire facias, or notice, was issued by the clerk of that court in substance as follows: It was addressed to the sheriff, and commanded him to make known to the appellants, naming them, that at the spring term, 1871, of the circuit court of Pickens county certain proceedings were had, which were set out. These proceedings contain a marginal statement of a case of the State against W. M. Gresham, without more. It is then recited that at that term of the court it appeared to the court that the said defendant, with his sureties, by name, had entered into bond, &c., for the appearance of the said defendant Gresham at that term of the court, &c., to answer an indictment to be preferred against him for manslaughter; and that the defendant being called, came not, but made default. Judgment was then rendered against them for the amount of the bond, unless they should appear at the next term and show cause to the contrary. A *scire facias* was ordered to issue to them. This notice was duly executed on Sprowl and J. B. Gresham. At the fall term, 1871, an *alias sci. fa.* was ordered, and was issued to, and served on, W. M. Gresham, which was of the same tenor as the other, except that it purported to be an *alias*, but omitted to state that the said defendant had failed to appear. No indictment for manslaughter appears to have been found against the defendant, but he was indicted at the spring term, 1871, for the murder of Thomas W. Ivey. At the fall term, 1871, the said defendant not having been before arrested, came into court and surrendered, whereupon, an *alias capias* was immediately issued and he was formally arrested. A demurrer to the *scire facias* for insufficiency was overruled. The defendants declined to plead further, and the court, upon the evidence of the record as above detailed, made the conditional judgment absolute.

The bail bond is in substantial compliance with that stated to be a proper form in section 4239 of the Revised Code. It is approved by a justice of the peace, known to be such by the circuit court. Although he is required by section 4022 of the Revised Code to return all undertakings

of bail and examinations of parties to the circuit court, no particular manner of doing so is prescribed. If the parties did not execute the bond, they should make the objection by plea. It was sufficiently authenticated.

The defendant Gresham was not indicted for the offense with which the magistrate charged him, and for which the bail was given, but for the highest grade of unlawful homicide, to-wit, murder. The conditional judgment does not disclose what indictment was found against the accused, but it recites the undertaking, and in other respects complies substantially with the form prescribed in section 4254 of the Revised Code. The notice to Sprowl and J. B. Gresham, the sureties, sets out the judgment *nisi*, but the *alias* subsequently issued to W. M. Gresham, the principal, fails to do so, or to state any breach of the obligation.

The essential statement which the entry of the conditional judgment should contain is, that the accused was required to answer the charge which the recognizors have stipulated that he should answer. This is necessary to show a breach of the bond. If the accused is required to answer a charge variant from that described in the condition of the bail bond, this will not show a breach.—*Howie & Morrison v. The State*, 1 Ala. 113; *The State v. Weaver*, 18 Ala. 293. Section 4245 of the Revised Code provides that the undertaking is forfeited by the failure of the defendant to appear, although the offense is incorrectly described in such undertaking; the particular case or matter to which the undertaking is applicable being made to appear to the court. This of course applies to such misdescriptions as, nevertheless, apprise the parties of the nature of the offense for which the indictment is to be preferred, the same being indictable. It must also be taken to apply to cases in which the indictment embraces or includes the particular indictable offense mentioned in the undertaking of bail. While it would be manifestly unjust to hold a bail bond forfeited because the accused did not appear to answer an indictment for an offense altogether different, and not even suggestive of the one mentioned in

it, it would be equally unreasonable to let him go free because the grand jury deemed his conduct more wicked in degree than the magistrate. He would well know that a charge of manslaughter might result in an indictment for murder.

But the judgment *nisi* does not state that the accused was indicted for any offense. This is a fatal omission. There could be no failure to appear without a demand for appearance, and without an indictment there could be no demand, and consequently no breach.—*Hall v. The State*, 15 Ala. 431; *Badger & Clayton v. The State*, 5 Ala. 21.

As the accused was on bail, the clerk was at liberty to make a minute entry of the indictment.—Revised Code, § 4148. If the conditional judgment had stated an indictment for murder, we think there would have been a forfeiture of the bond by the failure of the accused to appear, notwithstanding the stipulation for a case of manslaughter.

The *alias sci. fa.* to W. M. Gresham was defective also in not stating a default.

The judgment is reversed, and the cause remanded.

SCREWS ET AL. vs. WATSON.

[TRESPASS AGAINST SURETIES ON INDEMNIFYING BOND GIVEN SHERIFF AFTER LEVY OF EXECUTION ON PROPERTY ALREADY IN HIS POSSESSION UNDER LEVY OF ATTACHMENT, &C.]

1. *Trespass; what is, and who are partakers in.*—The seizure and sale by the sheriff of the property of W. without his consent, under pretense of authority of an attachment against the estate of McD., is a trespass on the part of the sheriff, and all those who advise or participate in the seizure or sale are co-trespassers with the sheriff.
2. *Indemnifying bond, sureties on; how may be sued, and for what liable.*—The sheriff having an attachment against the estate of McD., levied on the goods of W., and afterwards levied executions on judgments in the attachment suits against McD. on the same property, but refused to sell un-

less indemnified ; whereupon, the plaintiff in attachment, with sureties, entered into an indemnifying bond conditioned "to hold the sheriff harmless from all liability and damage in consequence of the levy,"—*Held*, that the obligors on such bond are liable in an action of trespass to the owner of the property, (where it was sold,) for the value of the property at the *time of its seizure* under attachment, with interest thereon to the time of the trial.

APPEAL from the Circuit Court of Montgomery.
Tried before Hon. JAMES Q. SMITH.

This was an action of trespass by Watson against appellants for the wrongful taking of seventeen boxes of tobacco, &c., the complaint following the form given in the Revised Code, page 677. One of the defendants not having been served, and Crommelin having died after the commencement of the suit, it abated as to them, and the trial was had between Watson and the remaining defendants, but upon what pleas issue was joined is not stated in the record. The evidence shows that on the 4th day of August, 1866, Thomas Crommelin, as administrator of Charles Crommelin, dec'd, commenced suit by attachment against J. R. McDonald, to recover amount due by him for store rent for the year 1865–6. The attachment was levied on the same day, on seventeen boxes of tobacco, which in fact belonged to Watson, but were then in the possession of McDonald, who held them for sale as a commission merchant. At the time of the levy of the attachment, the boxes were in McDonald's store with his individual property. Before the tobacco was removed, McDonald notified the sheriff of Watson's ownership, and called attention to entries in his books showing how McDonald held the tobacco.

On the 31st day of October, 1866, another attachment in favor of same plaintiff, and against McDonald, was levied by the sheriff on the same tobacco, it being then in his possession under the former levy. Judgments were rendered in favor of plaintiff in both of his attachment suits, and on the 7th day of February, 1867, execution on both came to the hands of the sheriff, (who was not sued,) who

levied them on the seventeen boxes of tobacco, but declined selling until he was indemnified by the plaintiff. The bond states its condition to be such, that whereas, Crommelin, administrator, &c., and the other obligors on said bond, did, on the 20th day of February, 1867, place, or cause to be placed, in the hands of the sheriff a certain execution, which is described, against J. R. McDonald, "and have required, or caused to be required, the sheriff to levy said execution on the property of defendant, [naming it] : "Now, therefore, if said Thomas Crommelin, administrator, &c., shall secure and hold harmless said A. H. Johnson, sheriff as aforesaid, from all liability and damages in consequence of such levy, if it shall afterwards appear that the property which may be levied on does not belong to said defendant, or is not liable to said execution, then this obligation to be void, otherwise to remain in full force."

The execution of this bond was the only connection the defendants had with the trespass. After the making of this bond, the sheriff sold the tobacco to satisfy said executions.

The bill of exceptions recites, that a number of witnesses were examined on each side "as to the value of the tobacco at the time of the levy," but the record fails to disclose which of the levies was meant thereby. This was substantially all the evidence.

The court charged the jury as follows:

"1. If you find from the evidence that the seventeen boxes of tobacco were levied upon in the storehouse of J. R. McDonald, under an attachment in the hands of the sheriff of Montgomery county, and was taken by said sheriff and sold under the attachment against J. R. McDonald, and you find that the tobacco levied upon and sold by the sheriff was not the property of J. R. McDonald, but was the property of the plaintiff, Samuel Watson, and that the seventeen boxes of tobacco were in the possession of McDonald, as agent or commission merchant of plaintiff, then your verdict will be for the plaintiff, Watson, for the reasonable value of the tobacco, (seventeen boxes, two hundred pounds each,) at the time of the levy of the attachment, with interest thereon up to date.

"2. If you find from the evidence that an attachment or execution has been issued against J. R. McDonald for the rent of the store-house occupied by him in 1866, which attachment or execution was levied upon seventeen boxes of tobacco, with other property, and the seventeen boxes of tobacco was the property of McDonald, then your verdict will be for the defendants."

To the first of said charges appellants excepted, and they then asked the court to give the following charges in writing, viz:

"1. If the jury believe from the evidence that the tobacco, for the wrongful taking of which this suit is brought, was levied on by the sheriff of Montgomery county, in the month of August, 1866, under the attachment offered in evidence, and was then taken into possession by said sheriff and was retained by said sheriff in his possession under said levy, until the 26th day of February, 1867, when the defendants executed the bond offered in evidence, and that the defendants, Reid and Screws, (appellants) had no participation in the taking of said tobacco, other than the execution of said bond, the plaintiff can not recover against said defendants (appellants) in this action.

"2. If the jury believe from the evidence that the plaintiff placed the tobacco, for the taking of which this suit is brought, in the possession of J. R. McDonald, for sale on commission, and that said tobacco so remained in the possession of McDonald until it was levied on and taken into possession by the sheriff, under the attachment against McDonald, then the plaintiff can not recover in this action."

The court refused to give the charges asked, and appellants duly excepted.

There was a verdict for the plaintiff, and the defendants bring the case here by appeal, and here assign as error—

1st. The charge excepted to.

2d. The refusal to charge as requested by the defendants.

WATTS & TROY, for appellants.—1. The charge given was

wrong. It makes appellants liable to an action of trespass, whether they had any connection with the sheriff's levy and seizure or not.—*Smiley et al. v. Fahnestock*, 18 Md. 391.

2. The proof shows that the goods of plaintiff were mingled with those of McDonald, so that they could not be distinguished from his; under such a state of facts, the sheriff would not be liable to an action of trespass for levying, although they did not in fact belong to defendants.—*Taylor v. Jones*, 42 N. H. 25.

3. Appellants were not liable in an action of trespass, although they had given a bond of indemnity. The sheriff had committed the trespass (if he committed any at all) several months before the bond was given; and giving such bond could not make them trespassers, although they might be liable in trover for the *conversion* of the property of plaintiff.—*Larkins v. Eckwurz*, 32 Ala. R. 322; *Carter v. Clark*, 28 Conn. 512; *Talmadge v. Scudder*, 38 Penn. St. 517; *Contrey v. Amis*, 13 Ind. 260.

4. But if appellants did become liable as trespassers by giving the bond of indemnity, when did such liability accrue? Clearly, not until the sheriff, prompted by their giving such bond, did some *act*; it did not accrue until he sold the goods. The bond is conditioned to pay such damages as the sheriff shall sustain by reason of his levying and selling under an *execution* issued February 7th, 1867, and placed by the makers of the bond in the hands of the sheriff February 20, 1867. The bond itself is dated February 26, 1867, and the sheriff sold on the 1st of March, 1867. The effect of the first charge was to make appellants liable for the *value* of the property on the — day of August, 1866, and for interest on such value from that time. It was, therefore, *wrong*.—See *Lovejoy v. Murray*, 3 Wall.

E. P. MORRISSETT, *contra*.—Trespass is the proper form of action. The general property draws to it the possession, sufficient to enable the owner to support trespass, although he has never had possession.—1 Ch. Pl. 169, and note 1; 3 Serg. & Rawle, 512; 7 Term Rep. 12; 7 Conn. 235.

Property in chattels draws after it possession, and the owner may bring either trespass or trover at his election. 10 Foster, (N. H.) 568; 7 Term R. 9.

There is a material distinction between personal and real property, as to the right of the owner to bring this action.—1 Ch. Pl. 176.

Every person in whom the general property is, may maintain an action of trespass for the taking or injuring thereof by a stranger, although the trespass was committed while the chattel was in the possession of another who had a special property in it.—1 Ch. Pl. 173; 2 Rol. Abr. 569, (P.); 3 Wall. (U. S.) Rep. 1; *Hills v. Hoitt*, 18 N. H.

The actual possession, unaccompanied with the right to the beneficial use and enjoyment of the property, does not take away the constructive possession of the general owner. 2 Greenl. Ev. § 614; 1 Ch. Pl. 188–195.

All persons who direct or assist in committing a trespass are liable as principals, and each of the trespassers is liable for all the injury done.—*Whitaker v. English*, 1 Bay, 15; *Palmer v. Crosby*, 1 Blackf. 142; 3 Wall. (U. S.) Rep. 1; 14 Johns. 406; 8 Wend. 557.

There was no error in the charge given. Crommelin, principal in the indemnifying bond, had caused the levies of the attachments. These parties, Crommelin and appellants, associated together as co-sureties on this bond, and engaged in a common unlawful purpose, are each bound by the acts of the other; each, by construction, or in contemplation of law, was in possession of notice, or knowledge had by either of them, in all matters relating to the common unlawful enterprise for which they are associated; on the principle that the act of one partner binds the firm of which he is a member, or notice to one is notice to all. For, *for the purposes of this co-suretyship on said bond, these parties are partners*. Now, at the time of giving this bond of indemnity to the sheriff, one of the co-sureties, Thomas Crommelin, had notice of a previous levy of attachment upon the goods of appellee, (having himself levied that attachment) which was notice to all his co-sureties.

The subsequent death of Crommelin, by which the suit abated as to him, can not relieve the surviving sureties of the notice which the law has already imputed to them.

If, then, these appellants had this constructive notice of the levy of attachment previously made by the sheriff, they, by this bond, assented to all that had been done by the sheriff, and are equally liable with him for every trespass committed, commencing with the levy of the original attachment, by which appellee was divested of the actual possession of his goods, and ending in their sale by the sheriff.

PETERS, J.—A question very much similar to the main question in this case came before the supreme court of the United States in the case of *Lovejoy v. Murray*, (3 Wall. 1.) In that case, Lovejoy brought suit against Pratt by attachment, and the sheriff levied the attachment on the property of Murray, which was assumed to be the property of Pratt. The sheriff, being in possession of the property thus seized under the attachment, was unwilling to proceed further or to sell under that writ unless he was indemnified. Upon this, the plaintiffs in the attachment executed a bond, in which, reciting that the sheriff had attached and taken possession of the property, they bound themselves to pay all damages. The sheriff then sold the property under the attachment; and then Murray sued the sheriff in trespass for a wrongful seizure and sale of his property on the attachment against Pratt, and recovered a judgment. The sheriff paid a part of this judgment; and Murray then sued the makers of the bond of indemnity for the same trespass, and one of the questions which arose in this latter suit, as stated by Mr. Justice MILLER, was this: "Did the defendants, in giving a bond of indemnity to the sheriff, thereby become liable as joint trespassers with him in the proceedings under the attachment?" In discussing this question he says: "It is sufficient, if they become liable for what was done by the sheriff after they gave the instrument. The trespass complained of was a continuing trespass, and consisted of a series of proceedings, ending

in the sale of the plaintiff's property under execution." The principles settled in this case leave it beyond question that the appellants in this suit, who were defendants in the court below, are co-trespassers with the sheriff in seizing and selling the property of the appellee under the proceedings on the attachment against McDonald. It was also settled in the above cited case of *Lovejoy v. Murray*, (*supra*,) that, fixing the liability against the sheriff by judgment, also fixed the liability against the parties to the bond for indemnity. Very clearly, the damages for the trespass should be a pecuniary compensation for the loss sustained by the owner of the property wrongfully taken. This, at the lowest rate, should be the value of the property at the time of the trespass, and interest on this value upon the judgment. When the injured party has obtained a verdict and judgment for damages for taking goods, the property is changed and the right to the goods is vested in the defendant, at least after payment of the judgment.—*Clark v. Halleck*, 16 Wend. 607; *Woolley v. Kean*, 2 Halst. 85; *Goldsmith v. Stetson & Co.*, 39 Ala. R. 183, 191. The plaintiff elects to take the damages in lieu of the goods. In such case, the damages could not justly be less than the price of the property wrongfully taken, with interest on that price from the taking. This would be a fair and reasonable compensation for the loss to the owner; and such compensation is a proper measure of the damages.—*Sedg. on Dam.* 29, 30, *et seq.* In this case, the sheriff might have been sued with the defendants in this action in the court below, and the recovery against him would have been the value of the goods taken, and interest on it from the conversion. *Hair v. Little*, 28 Ala. 236. In trespass, the damages must be the same against all who are found guilty.—*Ridge v. Wilson*, 1 Blackf. 410; 28 Ala. R. 236, *supra*. And whether a party commences a trespass, or comes in after it is begun and continues to the consummation of its injury in the loss of the property to the owner, he must be held guilty of the whole, else several verdicts might be found in the same action, which is not permitted.—1 Blackf. 410, *supra*; *Ellis*

Conn v. Prewitt et al., Adm'rs.

v. Bitzer, 2 Ohio, 91. Besides, it is laid down by Sedgwick, in his work on "The Measure of Damages," that "in the actions of tort, case, trespass, trover, replevin, and detinue, the rule is the same, with exception that in the two latter, the law makes a feeble and partial attempt to enforce the return of the specific chattels, for the taking or detention of which the suit is brought."—Sedgw. on Dam. p. 10. In trover, the value of the property, with interest, is the proper rule; and unless there are circumstances of aggravation, it is also proper in such a case as this.—Sedg. on Dam. 529, 530, 531, and cases there cited; *Williams v. Crum*, 27 Ala. 468; *Jenkins v. McConico*, 26 Ala. 213; *Ewing v. Blount*, 20 Ala. 694. The charge of the court below which is complained of does not transcend these limits. It was, therefore, free from error; and for like reasons, the charges asked and refused were properly refused.

The judgment of the court below is affirmed.

CONN vs. PREWITT ET AL., ADM'RS.

[EJECTMENT.]

1. *Ejectment; what will not support, against personal representative of decedent.*
A plaintiff in ejectment can not recover against the personal representatives of a decedent on a parol gift of the land to him by the said decedent, though accompanied with the possession; whether the consideration of the gift was the marriage of the plaintiff with his daughter or not.

APPEAL from the Circuit Court of Clay.

Tried before Hon. CHARLES PELHAM.

The facts are sufficiently stated in the opinion.

LEWIS E. PARSONS, for appellant.

TAUL BRADFORD, *contra*.

[No briefs came into Reporter's hands.]

B. F. SAFFOLD, J.—The appellant, as plaintiff in an action of ejectment, sought to recover land of which the appellees, as administrators of Alexander Prewitt, were in possession.

His evidence was, that in 1856 he married the daughter of the intestate, who shortly afterwards put him in possession of the premises. He erected buildings and made other improvements thereon, and occupied the same until after the death of his father-in-law. After this time, he held possession by a tenant from whom the defendants, in some way unknown to him, obtained the actual possession. His father-in-law, from 1856 to his death in 1867, recognized the property as his, both by his repeated declarations and his acts, particularly in paying taxes upon it as his agent. The court, at the instance of the defendants, charged the jury to find for them.

In *Trammell v. Simmons*, (17 Ala. 411,) this court said that while one in possession of land may recover against a mere trespasser who ejects him, a vendee with no other title than his vendor's bond can not recover against the legal title. In *Pinckard v. Pinckard*, (23 Ala. 649,) and *Evans v. Battle*, (19 Ala. 398,) it was expressly decided that equity will not enforce the specific execution of a parol gift of land by a father to his son, though accompanied by delivery of possession, either against the father himself, or his heirs-at-law and personal representatives after his death.

Under the authority of the above decisions, it is impossible for the plaintiff to recover in an action at law.

The judgment is affirmed.

CURRY vs. WILSON.

[TROVER.]

1. *Damages, ascertainment of after judgment nil dicit; what evidence inadmissible.*—In ascertaining the damages to which the plaintiff is entitled, after judgment by default or *nil dicit* in trover, evidence which can only mitigate the damages by subverting the judgment, is inadmissible.
2. *Conversion of goods; when may be deemed to be of best quality.*—Where the quality of the goods converted is not shown, they may be assumed to have been of the best quality.

APPEAL from the Circuit Court of Dallas.

Tried before Hon. M. J. SAFFOLD.

Wilson, the appellee, brought this action against J. A. Curry, the appellant, to recover damages for the conversion of twenty-seven bales of cotton.

The first count, which was in the form given in the Revised Code "for conversion of chattels," claimed damages for the conversion of twenty-seven bales of cotton. The second count alleged, in substance, that in the year 1864 appellant sold R. F. Curry two hundred bales of cotton, and bound himself to deliver one hundred and seventy-five bales of it to R. F. Curry's order, on the 5th of October, 1874, at a described time and place, as agreed on in the contract; that before the date at which the cotton was to be delivered, appellee purchased said one hundred and seventy-five bales of cotton from said R. F., who transferred to appellee appellant's obligation to deliver it, and notified him of the transfer; that while the obligation was of force, appellee demanded a delivery of said one hundred and seventy-five bales of cotton from appellant, &c., who refused, and converted the same to his own use, &c., to appellee's damage, &c.

The appellant appeared by attorney at the fall term,

1869, and the cause was continued by consent at successive terms until the spring term, 1870.

At the spring term, 1870, the following entry was made :

“B. J. Wilson, } Came the parties by their attorneys,
vs. } and it is ordered by the court, that the
James A. Curry. } plaintiff recover of the defendant his
damages, unless he appear within thirty days to answer
interrogatories filed in this cause.”

At the November term, 1870, judgment *nil dicit* was rendered against the defendants and a writ of inquiry awarded, which was executed at the next term. It appears from a bill of exceptions then taken, that “the plaintiff testified that in the fall of 1864 he bought of R. F. Curry, through Wm. Y. Lundie, (who is now dead,) as the agent of said R. F. Curry, one hundred and seventy-five bales of cotton, which was represented to be in the possession of the defendant, in Talladega county, Alabama; that subsequent to the purchase, he received of the defendant one hundred and forty-eight bales of said cotton; and in the summer of 1865 demanded of defendant twenty-seven bales of said cotton to make up said lot of one hundred and seventy-five bales. The defendant did not deliver the same when demanded, and has not delivered said twenty-seven bales since the demand; that in the fall of 1869 cotton that classed as middling was worth forty-five cents per pound in Selma. The plaintiff testified, on cross-examination, that he never saw the cotton in controversy in this suit, and did not know that said cotton ever existed, or the quality of the cotton, if it ever existed, and had no means of forming an opinion of the value of the cotton, except to compare it with cotton that classed as middling. The defendant objected to the statement of the plaintiff of the value of the cotton going to the jury as evidence, on the ground that there was no evidence of the existence of said cotton at any time, or evidence of its identity, or quality, if it ever existed, of which there was no evidence. The defendant’s counsel stated at the time of making said ob-

jection, that it was made to prevent the statement of the witness going to the jury as evidence of value of the cotton, for the purpose of mitigating the damages claimed by the plaintiff. The objection so made by the defendant was overruled by the court, and the defendant excepted. The foregoing evidence of the plaintiff was all the evidence that was offered by the plaintiff.

“The defendant was introduced as a witness, and proposed to testify for the purpose of mitigating the damages claimed by the plaintiff, that on the 5th day of July, 1864, he made an agreement with R. F. Curry to deliver to said R. F. Curry one hundred and seventy-five bales of cotton, belonging to said R. F. Curry, which cotton was then in the possession of the defendant in Talladega county, Alabama, and was to be delivered on the Alabama & Tennessee Rivers Railroad, when the defendant should be requested to deliver said cotton, unless the cotton should be destroyed by fire, or yankee depredations; in that event, the defendant was released from all obligations to deliver said cotton. In October, 1864, the defendant was informed by Wm. Y. Lundie, of Selma, Alabama, that he, as agent of said R. F. Curry, had sold said one hundred and seventy-five bales of cotton to the plaintiff. When the defendant was informed by Lundie of the sale of said cotton to the plaintiff, he notified the plaintiff of his readiness to deliver the one hundred and seventy-five bales of cotton; and between the 9th and 12th of October, 1864, the defendant delivered to plaintiff one hundred and twenty-eight bales of said cotton. On the 23d day of April, 1865, all of said cotton not delivered as above stated, except eighteen or nineteen bales, was burnt by a brigade of Federal soldiers, under command of Gen. Croxton, in the military service of the United States. The defendant had never been notified or requested to deliver said cotton before it was so destroyed by fire. On the 16th day of May, 1865, the defendant delivered to S. W. Riddle, as agent of the plaintiff, having authority to represent the plaintiff, the eighteen or nineteen bales of cotton that had not been destroyed by

fire by Croxton's command. The one hundred and twenty-eight bales of cotton delivered to said Buckalew, the eighteen or nineteen bales delivered to said Riddle, and the cotton destroyed by fire by Croxton's brigade, as above set out, includes the whole of the one hundred and seventy-five bales of cotton which the defendant, by his said agreement of July 5th, 1864, was to deliver to R. F. Curry, which he was informed by William Y. Lundie had been sold to the plaintiff, as hereinbefore stated. The plaintiff objected to the evidence proposed to be given by the defendant as above set out; the objection was sustained by the court, and the defendant excepted.

"The court charged the jury, that the only question before the jury for their consideration was the measure of the plaintiff's damages; that a judgment *nil dicit* at a previous term ascertained the plaintiff's right to recover, and precluded all other questions, except the measure of the plaintiff's damages; that the only evidence before the jury was that of the plaintiff, under which the jury should find for the plaintiff the value of the twenty-seven bales of cotton, with interest on such value from the time of the conversion of the cotton. To which charge the defendant excepted.

"The defendant then requested the court to give three charges in writing, stating that the charges were asked for the purpose of mitigating the damages claimed by the plaintiff; which charges are as follows: 1. To authorize the jury to find for the plaintiff, the jury should be satisfied by the evidence of the identity and value of the cotton sued for. 2. There is no evidence before the jury of the quality of the cotton sued for, and that evidence of the value of middling cotton is not conclusive of the value of the cotton sued for. 3. The plaintiff is not entitled to a verdict unless the jury are satisfied from the evidence of the quantity and value of the cotton sued for. The court refused to give said charges severally as they were asked, and the defendant excepted to the several rulings of the court in refusing to give said charges as said several rulings were made."

Curry v. Wilson.

The various rulings of the court to which exception was reserved, and the charge given and the refusal to give the charge requested, are now assigned for error.

HEFLIN & PETTUS, for appellant.

MORGAN, LAPSLEY & NELSON, *contra*.

B. F. SAFFOLD, J.—The judgment by *nil dicit* rendered against the defendant, who is the appellant, ascertained that he had converted to his own use, some cotton which was the property of the plaintiff.

In executing the writ of inquiry at the subsequent term, the only questions involved pertained to the damages to be recovered by the plaintiff. The evidence offered by the defendant, and excluded, tending to show the destruction of the cotton under circumstances which would relieve him from any liability, was matter of defense, subversive of the judgment.—*Ewing v. Peck & Clark*, 17 Ala. 339.

The measure of damages in trover, is the value of the goods at the time of the conversion, or at any subsequent time before the trial, with interest thereon. The reason of the rule is to indemnify the plaintiff fully, and to prevent the defendant from deriving any benefit from his tortious conduct.—*Williams v. Crum*, 27 Ala. 468; *Ewing v. Blount*, 20 Ala. 694. For the same reason, when the quality of the goods is not shown, the defendant can not complain if they are assumed to have been of the best quality. There is no error in the charge of the court, or in its refusal of those asked by the defendant.

The judgment is affirmed.

DEBARDELABEN ET AL. *vs.* STOUDENMIRE ET AL.

[APPLICATION TO SET ASIDE SALE OF LANDS OF DECEDENT, &C.]

1. *Probate court; when obtains jurisdiction to order sale of decedent's lands for distribution.*—An application to the probate court by an executor or administrator of a deceased person to sell the lands of the estate for distribution is, essentially, a proceeding *in rem*, and when the court has acquired jurisdiction by a petition filed containing the jurisdictional facts, an order of sale will not be void for errors that may intervene in the after proceedings of the case.
2. *Void order of sale; who may petition to have set aside.*—If, however, the petition is insufficient to give the court jurisdiction, the order of sale and a sale made under it will be void, and may be set aside and vacated in the court by which the order was made, on the application of any person or persons interested in, or prejudiced by, said order of sale.
3. *Jurisdiction; what construction will be put upon words used in petition, to uphold.*—The petition need not pursue accurately the language of the statute; any words that necessarily convey to the mind all that the statute requires will be sufficient, and the words used should be construed liberally and favorably, to sustain the jurisdiction of the court and the validity of the order of sale.
4. *County in which lands are situate; what description of lands will support jurisdiction.*—If the petition omits, in words, to state that the lands are in the county, or within the jurisdiction of the court in which the application is made, yet, if such a description is given as to leave no real difficulty in identifying the lands intended, it will be sufficient, especially if no objection is interposed before the final order of sale is made.

APPEAL from the Probate Court of Autauga.

Tried before Hon. W. G. M. GOLSON.

The transcript of the record in this case did not come into the Reporter's hands, and a search for it in the clerk's office has proved ineffectual. The opinion of the court seems to set forth all the facts necessary to a proper understanding of the case.

NORTHINGTON, and MORGAN, BRAGG & THORINGTON, for appellant.

WATTS & TROY, *contra*.

PECK, C. J.—The lands of an estate may be sold by order of the probate court having jurisdiction of the estate, when the same can not be equitably divided amongst the heirs or devisees.—Rev. Code, § 2221.

The application for that purpose must be made by the executor or administrator; must describe the lands accurately, and give the names of the heirs or devisees, and their places of residence; and such application must also state, if any, and which of said heirs or devisees are under the age of twenty-one years, or married women, or of unsound mind.—Rev. Code, § 2222.

A proceeding on such an application is, essentially, a proceeding *in rem*, and the jurisdiction of the court attaches, on the filing of the petition by the executor or administrator, setting forth the statutory grounds authorizing such sale; and an order of sale made on such an application will not be void for errors that may intervene in the after proceedings. Subsequent errors may render the order of sale erroneous, and liable to be reversed on appeal, but it will not be void.—*King v. Kent's Heirs*, 29 Ala. 542; *Satcher v. Satcher's Adm'r*, 41 Ala. 26.

A final order for the sale of the lands of a deceased person for distribution, made by a probate court on the application of the executor or administrator, can only be set aside and vacated in the same court, on the ground that it is void; not because it is erroneous. For errors in the proceedings and final order, the same may be reversed, but it can not be set aside and vacated by the court in which the order was made.—*Johnson v. Johnson's Adm'r*, 40 Ala. 247; *Satcher v. Satcher's Adm'r*, *supra*.

To determine whether the probate court decided correctly, in overruling the appellant's motion to set aside and vacate the order of sale in this case, we must examine the petition of the administrator, and see whether its statements, properly interpreted, conferred on the said court jurisdiction to make the said order; in other words, whether it contains the jurisdictional facts required by said section 2222 of the Revised Code above referred to. It must be

admitted, the petition is very unskillfully and inartificially drawn. This, however, is not sufficient to render the order of sale invalid; to do this, some essential requisite of the statute must be omitted. The petition need not pursue accurately the language of the statute; any words that necessarily convey to the mind all that the statute requires is sufficient; and the words, used in their proper connection, are to be construed liberally and favorably to sustain the jurisdiction of the court and the validity of the order of sale.—*King v. Kent's Heirs, supra.* In that case, the court, speaking of a proceeding in the probate court for the sale of the lands of a deceased person, say: "When the petition is directly assailed, the question is one of pleading, and the intendments are made against the pleader; but a different rule prevails, when the proceedings have gone into a decree under which rights of property have attached. Then every reasonable intendment, in the construction of the language of the petition, must be in favor of the validity of the paper. Under a different rule, designing persons might withhold objections for amendable defects until after the proceedings had terminated and rights had attached, and then vitiate the whole proceeding; thus converting a court of justice into a snare." In the case of *Satcher v. Satcher's Adm'r, (supra,)* the case of *King v. Kent's Heirs* is referred to, and like reasoning employed; besides, it is a case like the present, an application to the probate court to set aside and vacate a previous order of the court for the sale of the lands of a deceased person for distribution, and a sale made under such order, which, as in this case, had been confirmed by the court and the administrator ordered to make a deed to the purchaser, &c.

We will now proceed to examine the petition in this case, in connection with the objections made to it, having reference to its sufficiency to give the court jurisdiction of the application.

The first objection of this character is, that but one of the administrators filed the petition for the sale of the lands, his co-administrator not being a party to said peti-

tion. By looking to the petition alone, we are not informed that there was more than one administrator. The petition was filed by Josephus M. B. Stoudenmire, as administrator, &c., in June, 1863. A previous part of the record, however, shows that in August, 1859, nearly four years before, the said Josephus M. B. and John G. Stoudenmire were appointed administrators by the probate court of Autauga county; that they gave bond and qualified as the administrators of the estate of their deceased father, William J. Stoudenmire. The record fails to show that said John G. ever took any part in the administration of the estate of said deceased, nor does it show that he had resigned. The final settlement of the estate, as it appears in the record, was made by said Josephus M. B. alone, in December, 1863, and a decree was rendered against him, in favor of said John C., for his distributive share of said estate, and he appeared in open court and acknowledged full payment and satisfaction of said decree, which was entered of record. He also appeared, on said settlement, as the guardian of one of the infant distributees, in whose favor a decree for a distributive share of said estate was rendered, and as such guardian acknowledged full payment and satisfaction of said decree, which was entered of record accordingly. From all this, it seems to us not unreasonable to presume, that if he had not actually resigned, he had at least ceased to take any part in the administration of said estate, and that the said Josephus M. B. Stoudenmire was the sole acting administrator. But, whether this be so or not, his failure to join in the petition for the sale of the lands did not affect the jurisdiction of the court in the premises; it amounted to an error merely, and nothing more. The non-joinder of a proper party plaintiff never defeats the jurisdiction of the court; it is an error only, which, if the plaintiff sues in his own right, is fatal on demurrer, or on motion in arrest of judgment, or on error. If, however, the plaintiff sues in *autre droit*, as executor or administrator, it can only be taken advantage of by plea in abatement.—1 Ch. Pl. 13, 20. This objection, therefore, is not well taken.

The only other question affecting the jurisdiction of the court that it is deemed necessary to consider, is the objection, that neither the petition nor the decree for the sale of the lands shows that the lands described in the petition were within the jurisdiction of the court, or in the State of Alabama.

We have found no little difficulty in coming to a satisfactory solution of this question; but a careful examination of the petition, and construing the words employed by the rule of this court, as laid down in the cases of *King v. Kent's Heirs* and *Satcher v. Satcher's Adm'r, supra*, that the language of the record, in such cases, should be construed most favorably for the maintainance of the jurisdiction and decree of the court, our minds are drawn to the conclusion, that it sufficiently appears, from the petition, that the lands described therein are in the county of Autauga.

Although it is not directly so stated in the petition, yet what is said, reasonably interpreted, leads to that conclusion, and with the data therein stated it seems to us no real difficulty could exist in determining the county, as well as the particular location of the lands described in the petition. In the first place, such an application is to be made to the probate court of the county having jurisdiction of the estate.—Rev. Code, § 2221. The petition shows that the probate court of Autauga county is that court. The petitioner received his appointment as administrator from that court. The lands described in the petition consist of two tracts, or parcels; the first is described as the tract that had been assigned as dower to the widow, being a part of the south-west quarter of section eight, township sixteen, in range fourteen; metes and bounds, courses and distances are given, to distinguish the part of said quarter section that had been assigned as dower to the widow; and further, that it was bounded on lands formerly owned by William Pickett, containing seventy-five acres, and known as the Hendon tract.

The other tract is described as a quarter section, the

number not known, containing 160 acres, on which was the residence of the late William J. Stoudenmire, petitioner's father and intestate, and bounded as follows: On the east by R. P. Houser's land, on the north by Samuel Stoudenmire's land, on the west by Ed. Stoudenmire's land, and on the south by land of said R. P. Houser, purchased at a sale of lands belonging to the estate of said Wm. J. Stoudenmire, deceased.

With the description of the lands here given, we think no serious difficulty would exist in finding the lands intended, and when found, the county itself would be known. The larger tract is a quarter section, and bounded on its four sides by lands of three named individuals; and the other tract is land assigned to the widow as dower. With the names of the individuals given, and the records of the court, both tracts could be easily identified, and the maxim is, "*id certum est quod certum reddi potest.*" Such a description would be sufficient in an action of ejectment, and we can see no reason why greater certainty should be required in a proceeding of this kind. This objection, therefore, can not be permitted to prevail.

The other objections are based upon defects and errors, alleged to have intervened in the proceedings after the court below had acquired jurisdiction; and by the uniform decisions of this court, such defects and errors are held not to invalidate the order of sale, or the sale made under it; consequently, the probate court committed no error in refusing to set aside and vacate either the order of sale or the sale made under said order.

The judgment is affirmed, at the costs of the appellants.

NOTE BY REPORTER.—At a subsequent day of the term, the appellant applied for a rehearing. The application was denied at the present term, the following response being made by

PECK, C. J.—The reasons for a rehearing offered by appellants refer, almost exclusively, to errors alleged to have intervened in the proceedings in the probate court,

after that court had acquired jurisdiction of the case by a sufficient petition. Such errors can only be corrected on appeal. They do not render the decree of the court void, and, consequently, the court at a subsequent term has no authority to set the decree aside and declare it void.—See the cases referred to in the opinion.

The apparent inconsistencies in the dates in the transcript must be regarded as clerical misprisions, and can not affect the decree that has been affirmed, on such an application as the present.

The rehearing is denied, with costs.

BARBOUR COUNTY *vs.* HORN.

[ACTION AGAINST COUNTY FOR DAMAGE OCCASIONED BY FALL FROM DEFECTIVE BRIDGE.]

1. *Counties ; for what may be sued.*—Counties in this State are incorporations, established for specific and defined purposes, and are liable only for wrongs committed in the use or misuse of the corporate powers conferred on them.
2. *Same ; liability of, in regard to public bridges.*—Under our law, no general liability is imposed upon counties for injuries resulting from defective or unsafe condition of bridges, built for public use on the public highways.
3. *Same.*—The liability of counties in such cases is special, and defined by statute.
4. *Same ; complaint against ; what must show.*—A complaint against a county to recover damages for a fall resulting from the insufficiency or unsafe condition of a public bridge, must set forth a statement of facts which show the existence of this special liability. Among other things, it must be stated that no guaranty had been taken from the builder of the bridge, or that such a guaranty had been taken, and that the time during which it was to continue had expired before the occurrence of the injury complained of.
5. *Revised Code, section 1396 of ; to what cases applies.*—Section 1396 of the Revised Code, which gives a right of action for injuries occasioned by defect in a bridge, &c., is applicable to a suit brought against a county

Barbour County v. Horn.

for such injuries, although the bridge may have been built before the passage of the act, if the injury complained of occurred *after* its passage.

APPEAL from the Circuit Court of Barbour.

Tried before Hon. J. McCALEB WILEY.

This was an action commenced by appellee, against Barbour county, to recover damages for a fall from a public bridge, &c.

The plaintiff in his complaint claimed \$20,000 damages for injuries sustained by him, (which injuries are particularly set out,) which it is alleged resulted "directly and immediately from his fall from a certain bridge across Lick creek, in Barbour county, Alabama, which bridge, more than six years before said fall occurred, had been built and completed by contract with the court of county commissioners for said county, over said creek, and on the public highway in said county, leading from Glennville, in said county, to Clayton, in said county. Said bridge was built by the order of, and under contract with, said commissioners court; and plaintiff avers that the only guaranty, by bond or otherwise, which was required or authorized by said commissioners court of the undertaker or builder of said bridge was, that he, the undertaker or builder of said bridge, enter into bond, with good security, to keep said bridge in good passable order for said six years from the day of its completion; and that the aforesaid guaranty was required or authorized by an order of said commissioners court on the 16th day of August, 1852, and entered on its records. The plaintiff further avers, that more than six years had elapsed from the day of the completion of said bridge, before the fall or any of the grievances or injuries herein complained of and stated, occurred; and that the said guaranty by bond required or authorized by said commissioners court as aforesaid had expired by the lapse of more than six years from the day of the completion of said bridge, before said fall or any injury to plaintiff herein stated and complained of occurred; and that at the time said fall and injury to plaintiff herein stated and complained

of occurred, there was no valid or subsisting guaranty, by bond or otherwise, under any order or authority of said commissioners court or otherwise. The plaintiff avers, that after the expiration of the said guaranty referred to and mentioned in said order of said commissioners court, to-wit, on the 10th day of October, 1858, when plaintiff was crossing said bridge, in his buggy drawn by his horse, the said bridge was defective, unsound and unsafe, and the said horse became frightened at a hole in said bridge, and by backing with said buggy in consequence of such alarm, suddenly and without any fault on the part of the plaintiff, and without any ability on his part to prevent or avert its inevitable result, and in consequence of the said defective, unsound and unsafe condition of said bridge, precipitated said plaintiff and his said horse and buggy over and from said bridge into the stream below, thereby causing said plaintiff serious and permanent bodily harm, and producing such physical disability as to greatly impair the health of plaintiff, and to destroy his power of locomotion and his ability to do work and labor; and also greatly damaged his said horse and buggy, which were of great value, to-wit, of the value of one thousand dollars. By means of the premises, the plaintiff saith he hath been injured and hath sustained damages to the extent of twenty thousand dollars."

Due presentation of the claim and its disallowance in whole is also alleged.

The defendant demurred to the complaint on the following grounds:

"That the complaint does not deny that a bond or guaranty was executed and delivered by the contractor for the building of the bridge mentioned in the complaint, and by virtue of his said contract, and which bond was accepted from him under said contract, nor that such bond or guaranty had expired before the injury complained of occurred. The demurrer of the defendant was overruled, and the defendant excepted. Thereupon, the defendant plead, in short by consent, the plea of the general issue, with leave

to give in evidence any matter of defense or in bar which might be specially pleaded, and with like leave, by consent, for plaintiff to reply.

Plaintiff then read in evidence an order from the records of the court of county commissioners for Barbour county, in words and figures following, to-wit: "August 16th, 1852. Ordered, that Green Beauchamp, W. D. Horn, and Jacob Lowman be appointed commissioners to contract for the erection of a new bridge over Lick creek at the Beauchamp camp ground, requiring the undertaker to enter into bond with good security to keep the same in good passable order for six years from the day of its completion."

Plaintiff also read in evidence from said records another order, in words and figures following, to-wit: "First Monday in December, (6th day,) 1852. Ordered, that Hansford Dowling be allowed out of the county treasury the sum of sixty-six dollars for building a bridge on Lick creek at the camp ground.—See Report of Commissioners."

The plaintiff then offered in evidence a copy of the bond of Hansford Dowling (the original having been lost). This bond was dated December 6th, 1852, payable to W. R. Cowan, judge of probate, and his successors in office, and was in the penal sum of one hundred and thirty-two dollars, and was conditioned as follows:

"The condition of the above obligation is such, that whereas, the above bounden Hansford Dowling was the lowest bidder and undertaker of the building of a bridge over Lick creek, at the place known as Camp Ground Bridge, for the sum of sixty-six dollars; and whereas, said bridge having been completed in accordance with the specifications agreed on at the time of the letting; now, if the said Dowling should keep the said bridge in good repair for the term of six years, then this obligation to be null and void; otherwise to remain in full force and virtue in law. This the day and date above written.

"HANSFORD DOWLING,
"ELIAS DOWLING."

The deposition of the plaintiff was then read in evidence. It stated, in substance, that plaintiff's horse, hitched to a buggy, was passing quietly across the bridge over the creek near Beauchamp's mill in Barbour county, October 10th, 1858, when he suddenly attempted to whirl short round, and pitched the buggy off backwards, when he fell out of the buggy and his horse fell on him and caused the injury; he, horse and buggy, all fell about eight feet. "His horse was suddenly frightened, and he thinks the fright was caused by a hole in the bridge; the bridge was in very bad condition, having two holes in it; one a bad one, and the bright sunshine beaming through them doubtless caused the horse's fright. The bridge was about sixty feet long, and about ten or twelve feet high, and about twelve feet wide. It had no railing or banisters when the buggy was thereon. When the bridge was first built, it had railing and banisters, but they had mostly rotted down; there were a few pieces left scattered along. Good railing or banisters would, he thinks, have prevented his buggy from being thrown from the bridge. He received his injury, for which this suit is brought, on the 10th day of October, 1858. To the best of his recollection, in the last of August or first of September, 1852, the bridge was completed by the builder. He believes this was the time, from the fact that he was present and assisted Mr. Dowling in raising and completing the bridge."

Plaintiff also introduced the deposition of Maria Cooper, in which the fall and the nature of plaintiff's injuries were testified to. This witness further testified, that the bridge was an ordinary wooden bridge, without banisters or railings. The plaintiff introduced a physician and other witnesses, who proved the nature of his injuries, which were of an incurable and distressing nature; so much so that he would require nursing and care for the remainder of his life.

Hansford Dowling, a witness for plaintiff, testified, that he built the bridge in the fall of 1852, and it was finished about the last of September, 1852. He gave a bond, with his father, Elias Dowling, as security, in accordance with

his contract, and they made the bond before he got his pay from the county. Sixty-six dollars was the amount paid him. At the time plaintiff was injured, there was a good ford across the creek, near the bridge, which was traveled by persons on horseback and with teams, and it was a dry season of the year, and the water was low and the creek was easily forded. Several of the witnesses testified that travelers usually passed over the bridge at and about the time of the injury, although there was a ford near by that could be passed. The presentation of plaintiff's claim was proved.

The bill of exceptions then recites, that defendant then proved the loss from the files of the probate court of the report of Beauchamp and Lowman, the bridge commissioners, and plaintiff admitted that said report was dated December 6th, 1852, and in substance and in writing stated, that the bridge on Lick creek had been duly completed according to contract with Hansford Dowling, the builder thereof, and recommended that the court of county commissioners should receive the said bridge when bond was executed by said Dowling. Defendant then examined Green Beauchamp, who testified that he and Jacob Lowman, now deceased, were the commissioners who acted in letting out the contract for the building of the bridge over Lick creek, under appointment of the court of county commissioners. The letting was at the place where the bridge was to be built, and at public outcry. Hansford Dowling was the lowest bidder. They advertised the letting by posting notices throughout the neighborhood. He does not remember how long they advertised in this instance. He had frequently acted in the same capacity as a contract commissioner, and always gave reasonable notice beforehand, that the people in the neighborhood might be informed in the premises; and he thinks the notice in this instance must have been as long as three weeks before the letting. He does not recollect at what precise time the bridge was finished, but he and Lowman acted promptly in reporting the matter to the commissioners court, after completion of the bridge.

It further appeared in proof, that the road on Lick creek, and upon which said bridge was built, was a second grade road.

This was substantially all the evidence.

The court charged the jury as follows:

1. That the court of county commissioners were authorized to require a bond or guaranty from bridge builders, with certain stipulations specified in the statutes, and that bonds thus executed would protect the county against suit for damages occurring while they are in force and unexpired; but the bond read in evidence in this case was not such a bond as the court of county commissioners were authorized to receive, and did not protect the county against the suit of the plaintiff in this case.

2. If the court of county commissioners never required or authorized any bond or guaranty in relation to the bridge mentioned in the complaint, other than is specified or mentioned in the said order of August 16th, 1852, introduced in evidence; and if the said bridge was built under and by virtue of said order of August 16th, 1852; and if, after being so built and accepted by the authority of the court of county commissioners, the plaintiff was injured by a fall from the said bridge, as alleged in the complaint; and if the injury occurred as stated in the complaint, then upon these facts, the bond of December 6th, 1852, introduced in evidence, is no bar to a recovery of damages in this action by the plaintiff.

3. If the plaintiff, in driving his horse and buggy on the bridge at the time of the alleged injury to him, acted with common and ordinary caution, then he is not guilty of such negligence or fault, as of itself to prevent him from recovering, if in other respects he shows himself entitled to recover.

4. If the substance of the allegations of the complaint is proved by the evidence, the mere fact, if it be a fact, that plaintiff did not use the utmost possible caution in driving on said bridge at the time of the alleged injury, can not prevent him from recovering. The law did not require from

him the utmost possible caution, but only ordinary care and caution.

5. Although the law does not specially require that bridges built under contract have hand railings, yet it requires them to be "safe for travel;" and if the jury believe hand railings were necessary for such safety, then they are required.

To the giving of each of these charges, defendant duly excepted.

Defendant then requested the following written charges:

1. That bridges erected by contract with the court of county commissioners, with a guaranty by bond or otherwise, under section 1203 of the Code of Alabama, are not required by law to be of any prescribed width.

2. That if the evidence shows that the bridge from which the plaintiff's alleged injury was received was built during the year 1852, then section 1203 of the Code of Alabama does not apply to the case.

3. That section 1203 of the Code of Alabama, which came into force and effect on the 17th day of January, 1853, was not in force during the year 1852.

4. That bridges built under order of, or contract with the court of county commissioners during the year 1852, are not governed by the law of the old Code of Alabama, which took effect and went into operation on the 17th day of January, 1853.

5. If the jury believes from the evidence that the bond read to the jury, dated on the 6th day of December, 1852, was executed by Hansford Dowling and Elias Dowling, and delivered to and received by the court of county commissioners, and that upon the delivery of the bond the commissioners court passed the order for payment to Hansford Dowling, the builder of the bridge, of the sixty-six dollars mentioned in the order of that court, then the bond was a valid guaranty, and protected the county against any suit for injury occurring from any attempted use of the bridge so long as the stipulation in the bond was in force and unexpired.

6. If the injury happened within six years from the 6th day of December, 1852, the date of the bond read in evidence, the plaintiff can not recover, if the jury believe from the evidence that the bond was executed by the bridge builder, and accepted by the commissioners court, as a condition on which the commissioners court ordered payment to him of the contract price for building the bridge.

7. If the injury happened within six years from the time the bridge was completed, and before bond read in evidence had expired, the plaintiff can not recover, if the jury believe from the evidence that the bond was executed by the bridge builder, and accepted by the commissioners court, as a condition on which the commissioners court ordered payment to him of the contract price for building the bridge.

To the refusal to give each of these charges, the defendant duly excepted.

D. M. SEALS, with whom were COCHRAN, JOHN GILL SHORTER, and WILLIAMS & FOSTER, for appellant.

PUGH & BAKER, WOOD, and RICE, *contra*.

[No briefs reached Reporter.]

PETERS, J.—Counties, in our system of government, are not the same that they were at common law. They are purely statutory creations, and are incorporated for special purposes. Their liabilities grow out of their corporate powers, and for wrongs committed in the use or misuse of these powers, they are subject to be sued.—Rev. Code, § 897; *Autauga County v. Davis*, 32 Ala. 703. But the weight of authority and principle are opposed to subjecting them to any common law liabilities.—*Russell et al. v. County of Devon*, 2 Term R. 667; *Mitchell v. Tallapoosa County*, 30 Ala. 130; *Van Eppes v. County Commissioners of Mobile*, 25 Ala. 460; 2 Kent, 274, margin, and cases cited in appellant's brief; *Barbour County v. Bronson*, 36 Ala. 362, 366. Such corporation is an artificial person, "invisible, intangible, and existing only in contemplation of law."

It can only act through its agents, and these must confine their acts within the limits of their powers in order to bind the county. That is, such agents can do only what the county could do for itself had it the capacity to act without their aid. This is the law of all agencies with special powers.—*Golding v. Merchant & Co.*, 43 Ala. 705; *Waring v. Henry et al*, 30 Ala. 721; 2 Kent, 620, 621.

In this case, the agency of the corporation is conferred upon the court of county commissioners to contract for the building of bridges in certain cases, but no power to prevent the injury complained of.—See *Smoot v. Wetumpka*, 24 Ala. 112; *Barbour County v. Brunson*, 36 Ala. 362. The law does not impose upon the county a general liability for injuries occasioned by the insufficiency of all the public bridges built within its limits for the passage of travelers, but only a special liability. The complaint, then, must show such a statement of facts as brings the case within this special liability. Among these facts it must be alleged that no guaranty was taken from the builders of the bridge, or that such guaranty was taken, and that the time stipulated for its continuance had expired before the injury complained of was inflicted. One of these alternative facts must be stated along with the other necessary allegations of the complaint, in order to show a right of action.—Rev. Code, § 1396; *Covington County v. Kinney*, 45 Ala. 176. I quote below so much of the statute as shows the necessity of the one or the other of these allegations. It is in these words: “When a bridge or causeway has been erected by contract with the county commissioners, with a guarantee, by bond or otherwise, that it shall continue safe for the passage of travellers and other persons for a stipulated time, any person injured in person or property before the expiration of such period by defect in such bridge or causeway, may sue in his own name on the bond or other guaranty, and recover damages for the injury; and if no guaranty has been taken, or the period has expired, may sue and recover damages of the county.”—Rev. Code, § 1396; Code § 1203. The complaint in this case bases the right of re-

covery on the latter alternative: That is, that a guaranty was given as required by the statute, and the period of time stipulated therein, during which the bridge should continue safe for the passage of travellers and other persons, had expired before the plaintiff was injured as alleged in this complaint. Such a complaint is sufficient.—*Barbour County v. Brunson, supra.*

It is said by the learned counsel for the appellant that to apply the statute found in the Code to this case, is to give it a retrospective effect; which is not usual with such enactments. I think a more careful study of this statute obviates this objection. The law is one providing a remedy for injuries which have accrued in a certain manner. It is to be applied to such injuries as have accrued since its passage. In such an application it cannot be said to be construed so as to act retrospectively. This could only be when the injury happened before its passage. Such is not the case here. Here the remedy is applied to injuries which have arisen since the passage of the act, and not to such as might have arisen before its passage.—Smith's Com. p. 289, § 149; 2 Bour. Law Dict. 12th ed. p. 475—word RETROSPECTIVE; *Satterlee v. Matthewson*, 2 Pit. 380. The statute referred to went into effect on the 17th day of January, 1853, and the injury complained of is stated to have happened on the 10th of October, 1858. Whether the section of the Code above mentioned applies to a case like this, is to be referred to its language. That most clearly comprehends this case. And the reason and purpose of the law also concur in this construction as strongly as they could in the case of a bridge contracted to be built since the passage of the enactment giving the remedy. The purpose of the law would be the same in either case, a legislative effort to secure the safety of the citizen against injuries occasioned by insufficient and unsafe bridges on the highways of the State. When this case was here before, it seems to have been taken for granted that the county commissioners had authority to contract for the building of the building in question, and to take the guaranty re-

ferred to in the Code.—*Barbour County v. Horn*, 41 Ala. 114. The law creating the powers of the commissioners court is somewhat obscure before the Code. A court called the commissioners court of revenue and roads was established in 1821, and, among other things, its jurisdiction was made to comprehend “all powers in relation to roads, bridges, highways, ferries and causeways, which are at present given to and exercised by the orphans’ court.”—Toulmin’s Laws of Ala. p. 200, §§ 28, 29, 30. At the time the county court of county commissioners were “authorized and required to contract and agree for the building, keeping and repairing” of bridges within the county limits.—Toulmin’s Laws of Ala. p. 395, § 13. This continued to be the law up to the compilation of Clay’s digest of the laws of Alabama in 1843, which included the laws then in force at the close of the session of the General Assembly of February, 1843.—Clay’s Dig. 149, § 1; Clay’s Dig. p. 511, § 19; Aikin’s Dig. p. 86, § 1; Aikin’s Dig. p. 36, § 24.

This was then the law before the adoption of the Code and up to that event. But all this law was not carried into the Code, and, consequently, all that is not found in that compilation is repealed.—Code, § 10. The law of the Code restricts the powers of the commissioners court to contracting for the building of toll bridges, in which a guaranty is required and none others.—Code, §§ 1189, 1191, 1196, 1197; Rev. Code, §§ 1381, 1383, 1389, 1390.

The section of the Code above quoted which makes the county liable for injuries which accrue from the unsafe condition of bridges built by contract with the county commissioners, refers as well to bridges that might have been built before its passage as to bridges that might be built afterwards, as will be seen by inspection of the language of the statute itself. It clearly comprehends all bridges built under contract with the county commissioners, whether they be toll bridges erected since the proclamation of the Code, and under its provisions, or to free bridges established before the Code went into effect. At the same time it is perfectly clear that the commissioners

court is one of very limited jurisdiction. All its powers are statutory.—Shep. Dig. p. 511, § 1. Then this court cannot bind the county, except in the manner and to the extent prescribed in the statute conferring the authority to act. But before the Code, and until it went into effect, as the law then existed, the commissioners court could contract for the building of a bridge. All the terms of this contract were left to the court. The court could then proceed in the matter of the contract according to its own discretion. Any terms which would amount to a rational exercise of so general a power would be sufficient.—*McClure's Executors v. Spotswood*, 19 Ala. 165. The commissioners might dictate the terms of the contract and all its incidents. They might demand and take a guaranty for the safe passage of travellers and other persons over the bridge, to continue for such length of time as they might be able to agree upon, with the builder, or they might omit to demand or take such guaranty altogether. They might also fix the payee in the bond when the guaranty was by bond. This might be any competent person not forbidden to enter into contracts. I therefore think that the bond in this instance is sufficient as a guaranty to bring the case under the influence of the section of the Code above quoted.—Code, § 1203; Revised Code, § 1396; *Barbour County v. Horn*, 41 Ala. 114.

This disposes of all the questions raised upon the record, except the charges given and refused by the court on the trial below. There were twelve of these charges, five of which were given and seven asked and refused. And the ruling of the court was excepted to by the defendant below, in both instances.

The proof tends to show that the bridge in controversy was erected by contract with the county commissioners of Barbour county, between the 16th day of August, 1852, and the 1st day of September of the same year. The erection of the bridge costs sixty-six dollars. An allowance for this sum was made on the 6th day of December, 1852, by the commissioners court of said county. The indemnity or

guaranty taken for the safety of the bridge and keeping it in good repair was by bond, in the penalty of one hundred and thirty-two dollars, which was double the cost of its erection. It was made payable to "William R. Cowan, judge of probate court, and his successors in office." It bears date the 6th day of December, 1852. "The condition is expressed in the words following, to-wit: "The condition of the above obligation is such, that whereas, the above bounden Hansford Dowling was the lowest bidder and undertaker of the building of a bridge over Lick creek, at the place known as the camp ground bridge, for the sum of sixty-six dollars; and whereas, said bridge having been completed in accordance with the stipulations agreed on at the time of letting; now, if the said Dowling should keep the said bridge in good repair for the term of six years, then this obligation to be null and void; otherwise to remain in full force and virtue in law. This the day and date above written." The testimony also tends to show that the bridge was in unsafe condition and not in good repair, and that the plaintiff Horn, in attempting to pass it on the 10th day of October, 1858, was thrown from it with his horse and buggy and very seriously injured.

Neither the bond for the guaranty nor the order of the commissioners court for the allowance of the sixty-six dollars, the price to be paid for the erection of the bridge, show with certainty when the period during which the bridge was to be kept in good repair expired. The first charge given to the jury assumes that the bond was void—or that the period of six years during which the bridge was to be kept in good repair, had expired. In either sense the charge was incorrect. The bond was not invalid, as has been above shown, and a charge that the period of six years covered by the guaranty had expired, is a charge upon the effect of the evidence, without being so required by one of the parties. This is error.—Revised Code, § 2678; *Edgar v. The State*, 43 Ala. 45.

The second charge given is erroneous for a like reason. It also assumes that the bond was void, or that the guar-

anty had expired. This was also a charge upon the effect of the evidence, and erroneous unless it appears that such a charge was requested by one of the parties.—43 Ala. 45, *supra*.

The third and fourth charges given and excepted to were free from error. Travel is an ordinary and common business of the country. All persons, young, middle aged and old, may engage in it. Then, such diligence as would reasonably be required in the ordinary business of life would be sufficient. These charges do not go beyond this.—*Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189, 203.

The evidence tends to show that the bridge was built with balustrades or hand-railing, and was so accepted by the commissioners court. Such fixtures then were deemed necessary for its safety when it was built, as they would hardly have been put up for mere ornament. The bond required and given, was that the bridge should be kept in good repair for a period of six years. As the security of the bridge for passage was a question in the case, and there was evidence tending to show the destruction of the hand-railing, the charge upon this portion of the evidence was in conformity with the law. It was not erroneous. This was the fifth charge.

The first charge asked by the defendant below was properly refused. It was not a charge upon the evidence. It was abstract. The proof shows that the bridge was not erected by contract under section 1203 of the Code of Alabama. It was erected before the Code went into operation. And this section of the Code was not in force when the bridge was contracted to be built. The same may be said of the second charge asked and refused. It is not a correct statement of the law applicable to the testimony. This results from what has already been said upon the statute providing a remedy in a case like this. The third and fourth charges should not have been given as asked by the defendant below. They show no matter of law which is a legal defense to the action. Their refusal could

not operate as an injury to the party asking them. The action of the court complained of must not only show error, but it must show injury also; else the cause will not be reversed. Error and injury must both combine in order to justify a reversal.—Shep. Dig. p. 568, § 82; *Gregory v. Walker*, 38 Ala. 26; *Bell v. Chambers*, 38 Ala. 660; *Hawkins v. Dumas*, 41 Ala. 391.

The fifth charge asked and refused should have been given. It was a correct statement of the law applicable to the evidence; and the same may be said of the seventh charge asked and refused. They contain certain correct expositions of the law applicable to the evidence.—*Barbour County v. Brunson*, 36 Ala. 114; Revised Code, § 1396.

The sixth charge asked and refused should not have been given. The date of the bond is not necessarily the time at which the period of the guaranty should have its commencement. This was a bond entered into before the Code took effect. Such a bond might fix the period of commencement of the guaranty at the date of the bond, or it might be fixed independently of the bond, at the completion and acceptance of the bridge, or at such time as might be agreed upon by the parties. This was a fact, then, not without dispute. The law did not settle it. The charge takes it from the jury, and as such it is an invasion of their province. Such charge should be refused.—Shep. Dig. p. 459, § 13.

For errors above pointed out, the cause must be reversed and remanded for a new trial, and the judgment of this court will be entered accordingly.

NOTE BY REPORTER.—The opinion in this case was delivered at the January term, 1871. Both the opinion and the transcript in the case were misplaced in some way in the Clerk's office, and did not come into the Reporter's hands in time to be reported earlier.

ANDERSON *vs.* THE STATE.

[INDICTMENT FOR BURGLARY.]

1. *Rev. Code, § 3695 ; indictment for burglary under ; what description of property sufficient under.*—An indictment for burglary, under our statute, for breaking and entering the pick-room of a gin-house with intent to steal, is not bad on demurrer, because the ginhouse is described as “the property of the estate of Mrs. Lewis.” This is a sufficient description of the house alleged to be broken and entered, though it should appear that Mrs. Lewis was dead, before the alleged time of the commission of the offense charged.—(Rev. Code, § 3695.)
2. *Same ; evidence under.*—The offense alleged in such an indictment may be shown by proving the facts alleged in the indictment, and that the house mentioned was erected on lands which belonged to Mrs. Lewis at her death, and were devised in her will to third persons, and that her estate was unsettled and in the possession of her executor for administration.

APPEAL from the Circuit Court of Lowndes.
Tried before Hon. JAMES Q. SMITH.

The opinion states the case.

FITZPATRICK & WILLIAMSON, for appellant.—Property must belong to some living person, natural or artificial. The “estate of Mrs. Lewis” is not such person. If it means Mrs. Lewis’ property, she was dead and could not hold property ; if the “estate,” it is a legal nonentity. It should have been charged as the property of the executrix, the devisees or the lessees.—2 Hale’s P. C. 181; 2 East P. C. 652; *Cole v. Com.*, 5 Grattan, 696.

The Attorney-General, *contra*.

PETERS, J.—This is a prosecution for burglary. The indictment is in the following words: “The grand jury of said county charge, that before the finding of this indictment, Bully Bibb, *alias* Patrick Bibb, *alias* Patrick Anderson,

broke into and entered a building attached to a gin-house, commonly called a lint-room, the property of the estate of Mrs. Lewis, in which goods, merchandise or other valuable articles were kept for use, sale or deposit, with the intent to steal, against the peace and dignity of the State of Alabama." This indictment was demurred to by the defendant in the court below. The ground of demurrer is that the words, "estate of Mrs. Lewis," do not embrace an averment that the property belongs to any person. There are two other grounds alleged, but they are not sustained by the record, or they are merely different statements of the ground above cited. Whether the house broken into and entered is sufficiently described in the indictment or not, must depend in a great measure upon our statute creating the offense. This statute is in these words: "Any person who, either in the night or day time, with intent to steal, or to commit a felony, breaks into and enters a dwelling-house, or any building within the curtilage of a dwelling-house, though not forming a part thereof; or into any shop, store, warehouse, or other building, in which any goods, merchandise, or other valuable thing, is kept for use, sale, or deposit, is guilty of burglary, and must on conviction be imprisoned in the penitentiary, or sentenced to hard labor for the county, for not less than two, nor more than twenty years."—(Rev. Code, § 3695.) It will be readily perceived that this definition of burglary is quite different from that of the same offense at common law. "The word burglary," says Mr. Chitty in his excellent and accurate treatise on criminal law, "is a compound of the Saxon term *burgh*, a house, and *laron*, theft; and originally signified no more than the robbery of a dwelling; but it is now defined to be *the breaking and entering the house of another in the night-time with intent to commit a felony*, whether the felony be actually committed or not." (Jacob Law Dict., Burglary, 3 Inst. 63; 3 Chitt. Cr. Law, p. 1101; 4 Bla. Com. 224; 2 Russ. on Crs. p. 2, Metcalf's Ed. 1831.) At common law the ownership of the house was essential to the offense. It was required that it should

be "the house of another." Under our statute this is not so; and the character of the building broken and entered is all that is required, with such a description of the building as enables the State to identify it by the evidence for the prosecution. The offense charged in this indictment is one created by the statute. The description of the offense is in the language of the statute, with such a description of the house added as may be proper to identify it. This, under our practice, in like cases, is enough.—(25 Ala. 64; 22 Ala. 54; 19 Ala. 552; 18 Ala. 119; 17 Ala. 181.) The identification of the house by description is only so far necessary as to protect the defendant, should he be acquitted, from being a second time put in jeopardy for the same offense, or a second time punished for the same cause.—(*Butler v. The State*, 22 Ala. 43.) When the description accomplishes this purpose it is sufficient. The description in this indictment quite comes up to this requirement. The demurrer, then, was properly overruled.

The proof tended to show that the accused had broken and entered the house mentioned in the indictment with intent to steal as charged therein. And also that one Mrs. Lewis had owned said house in her life time; that she had died before the time of the finding the indictment; that she had made her will devising the lands, on which said house was situated, to Fannie Lampkin and ——— Lampkin, and that before the house was entered as charged said will was duly proven and admitted to record as required by law. It was also shown that the estate of Mrs. Lewis was unsettled and undivided, and that the gin-house property was in the possession of the executor of her will, at the time the indictment was found. On this testimony, the court was asked by the accused, to charge the jury, "That if they find that Mrs. Lewis, mentioned in the indictment, died in 1870; that she made a will devising the plantation and gin-house to Fannie Lampkin and ——— Lampkin, and that the said will was probated before said gin-house was entered as charged in the indictment, then they cannot find the defendant guilty as charged." This

charge the court refused and the prisoner excepted. The court then charged the jury, "That if they found from the evidence, that in the county of Lowndes, the prisoner broke into and entered the gin-house specified in the indictment, the property of the estate of Mrs. Lewis, deceased, the same being a place where goods, wares, merchandise, or other valuable thing, was then kept for use, sale, or deposit, with the intent to steal therefrom, then they may find the prisoner guilty as charged in the indictment;" and "that the death of Mrs. Lewis before the indictment found, and that she devised in her will to other persons, the lands upon which the gin-house is erected and the gin-house, subject to the payment of her debts, cannot effect the ownership as stated in the indictment, if the evidence shows the estate of Mrs. Lewis is unsettled and that the gin-house was held by her executor at the time the indictment was found, for the purpose of settling up her estate." This charge was also excepted to by the accused and made a part of the record as required by law. Upon the principles already alluded to above, the action of the court below, in the refusal of the charge asked and in giving the charge last above set forth, cannot be condemned. The breaking and entering of any house of the character of those named in the statute, and for the purpose and in the manner forbidden by law, is burglary. The allegation of title is not a characteristic of the offense, but to point out with certainty the house that had been broken and entered, so that the defendant may be enabled to deny with certainty the breaking and entering complained of. The title is only one of the modes of a certain identification of the house, but it is not the only mode. Any other mode that is certain will do as well. In burglary it is the possession that is invaded; and at common law an allegation of possession by a tenant was sufficient. If the domicile invaded was his mansion-house *pro hac vice*, he was the owner for the purpose of the crime.—2 Bish. on Crimes, § 109, 110, 111; 3 Chitt. Crs. p. 1101, 1102; 3 Greenlf. Ev. § 81; 1 Russ. on Crs. p. 813, 814, and cases there cited.

But our statute, it will be seen upon inspection, does not confine the crime to the dwelling-house of *another*, but to all houses of certain descriptions. If, then, the allegations, of the indictment sufficiently identify the house so that the accused is apprised what he has to defend, I think, under our statute, this is enough. It is laid down by Mr. Chitty, if one die in a house and his executors put servants in it and keep them there at board wages, burglary may be committed in breaking it, and it may be laid to be the executors' property.—(3 Chitt. Cr. Law, p. 1102; 2 East. P. C. 499.) The evidence in this case was not objected to when it was delivered to the jury, but it is attempted to destroy its effect by the charge of the court. This cannot be done unless it is wholly impertinent, and should not have been admitted for any purpose in the first instance. I do not think this is the case. There is no sensible construction of the words used in the indictment to describe the house, alleged to have been broken and entered, except that they mean to declare that the house mentioned constitutes a part of the property or estate of Mrs. Lewis. (Rev. Code, § 4128.) The evidence tends to prove this allegation. There was then no available error committed by the court in the refusal of the charge asked nor in giving the charge objected to.

The judgment of the court below is affirmed, and the same will be executed according to law.

[NOTE BY REPORTER.—The opinion in this case was delivered at the January term, 1873. The case has been here reported by direction of the Chief Justice, who deemed it proper to have the decision published in advance of other cases decided at the same term, on account of its importance in the administration of the criminal laws.]

BOWEN, SURV. PART. *vs.* BLOUNT ET AL.

[BILL IN EQUITY TO SUBJECT SEPARATE STATUTORY ESTATE OF MARRIED WOMEN TO PAYMENT OF NOTES SIGNED BY HER AND HER HUSBAND FOR FURNITURE USED BY HER, &c.]

1. *Statutory separate estate; what creates.*—Where the wife with her own moneys purchased a tract of land, in this State, on the 5th day of January, 1852, and the deed is made to her “to have and to hold the above granted and described premises and appurtenances unto her, her heirs and assigns for ever, to and for their and their only proper use, benefit and behoof for ever,” this creates in her a separate estate, to be held under the Code of Alabama and the Revised Code of Alabama.
2. *Same; for what debt can not be subjected.*—The land thus held can not be sold under a decree on bill in equity for the payment of a promissory note given by the wife and her husband jointly, made by them since 1852, whether the debt so made is her debt or the debt of her husband, unless, perhaps, it was for “articles for the support and comfort of the household,” under section 2376 of the Revised Code.

APPEAL from the Chancery Court of Mobile.
Tried before Hon. ADAM C. FELDER.

The opinion states the case.

D. P. BESTOR, for appellant.
J. LITTLE SMITH, *contra*.

[No briefs reached Reporter.]

PETERS, J.—This is a suit in equity, commenced by the appellant, Bowen, surviving partner of the firm of J. Bowen & Gilman, as complainant in the court below, against Frederick S. Blount and his wife, Emily J. Blount, as defendants, for the purpose of subjecting Mrs. Blount's separate estate to the payment of two certain promissory notes, each for one hundred and twenty dollars, executed by her said husband and herself, on the 27th day of November, 1857. Mrs. Blount died during the progress of the

cause in the court below, and the suit was revived in the name of her heirs and devisees. At the hearing, the bill was dismissed at the cost of Bowen in the court below, who brings the case here by appeal.

The essential facts of the case may be stated as follows: On January 5, 1852, Mrs. Blount, then the wife of said Frederick S. Blount, purchased from Robert D. James, as the executor of the last will and testament of Isaac H. Irwin, deceased, certain real property lying in the city and county of Mobile, in this State, which is particularly described in the bill. In the deed of the vendor, Mrs. Blount is mentioned as "the party of the second part," and the conveyance is to her: "To have and to hold the above granted and described premises and appurtenances unto the said party of the second part, her heirs and assigns for ever, to and for their and their only proper use, benefit and behoof forever." Mrs. Blount took possession of the lands thus sold to her, and held the same, as her separate estate. And afterwards, on the 27th day of November, 1857, she joined her said husband, said Frederick S. Blount, in the execution of two promissory notes, as above said, and jointly and severally with her said husband promised to pay said firm of J. Bowen & Gilman the sums of money named in said notes, on a day before the commencement of this suit. It is also alleged that said Frederick S. Blount is insolvent, and that the consideration of said notes "was for furniture and other merchandise bought of and from said firm of J. Bowen & Gilman by the said Emily J. Blount; said furniture and merchandise having been used in the dwelling-house of the said Frederick S. Blount and the said Emily J., his wife, and for their joint benefit." Gilman died, and the bill is filed by Bowen, as the surviving partner of the said firm of J. Bowen & Gilman.

Mrs. Blount and her husband both answer the bill, and demur for want of equity. She also sets up her right to the real estate mentioned in the bill as her separate estate, under the act of the Legislature of this State "of 1849-1850, No. 23, Pamphlet Laws 1849-50, page 63, and the

Code of Alabama;" and she insists and avers, that it is "governed by their restrictions and provisions." She also denies that she is liable on the notes set out in complainants' bill, or that she received any consideration for the same. After the cause was at issue, some testimony was taken by the complainant which tended to show, that the consideration of the notes in suit was, in part at least, the price of a rose-wood piano and piano-stool purchased in 1853 on credit, and that the credit was given to Mrs. Blount and not to her husband, who was then insolvent.

Where a bill shows upon its face a want of equity, the chancellor may dismiss it at the hearing without a demurrer or a motion for that purpose.—(11 Ala. 943, 3 Stew. 9.) Here it is quite certain that it is the sole purpose of the suit to reach the separate estate of Mrs. Blount to enforce the payment of her own or husband's debt, contracted since the Code of Alabama went into operation. It is also equally beyond rational controversy, that her property mentioned in the bill is held by her under the restrictions and provisions of the act of the General Assembly of this State, entitled "An act to alter and amend an act *securing* to married women their separate estates, and for other purposes," approved on February 13, 1850.—(Pamph. Acts 1849-50, p. 63.) This is the same law, so far as it goes, which has been incorporated into the Code and the Revised Code of this State.—(Code of Ala. § 1982, 1993; Rev. Code, § 2371, 2382.) Such an estate is governed and limited by the law of the Code, and is the statutory separate estate of the wife; which neither she nor her husband can charge with his or her debts, except in the manner and for the purposes prescribed by the statute.—(*Warfield v. Ravesies and Wife*, 38 Ala. 518; *Bibb v. Pope*, 43 Ala. 190; *Wilkinson v. Cheatham*, 45 Ala. 337, Head-notes Jan. term, 1871, p. 12; Rev. Code, § 2371, 2382, *supra*; 35 Ala. 653; 30 Ala. 335.

The discussion of this important statute is so full in the above cited cases, that it would be a needless labor to repeat the argument here, notwithstanding the very able and

elaborate briefs of the learned and diligent counsel for the appellant in this court. The language of the Code and the Revised Code is the same in defining the wife's title to her property. It is this: "*All property of the wife, held by her previous to the marriage or which she may become entitled to after the marriage, in any manner, is the separate estate of the wife, and is not subject to the payment of the debts of the husband.*"—(Code of Ala. § 1982; Rev. Code, § 2371.) And a subsequent section of the Code brings under the operation of this statute the *separate* estate of all married women in this State, acquired since the first day of March, 1848, from and after the time the Code went into operation.—(Code of Ala. § 1993; Rev. Code, § 2382.) It is further declared by the same law, that—"The provisions of this article take effect and are operative on the *estates* of all married women, who have been married or have received property by descent, gift or *otherwise, since the first of March, one thousand eight hundred and forty-eight;*" which was the date of the first amendatory statute on the subject of "the protection of the rights of married women" in this State.—(Code of Ala. § 1997; Rev. Code, § 2388.) The Code of Alabama went into operation on the 17th day of January, 1853.—(Pamph. Acts 1853–1854, Act No. 88, p. 71, § 2.); and it brought under its protection the estate of Mrs. Blount, whether that estate by the deed of purchase, was a separate estate or not. After the adoption and promulgation of the Code as an operative law, its effect was to render the words in a conveyance of property to a married woman, which had been before that time used to limit the property conveyed to her for her separate use, unnecessary. Such words are now mere surplusage. The law intervenes and controls and defines the conveyance, if made to her. The contract of conveyance may limit the extent of her estate, but it can not defeat or impair her rights under the statute. In whatever mode the conveyance may be made the statute enters into and forms a part of it, and governs its construction. Else the contract creating the estate could be made to dominate the

Bowen, Surviving Partner, v. Blount et al.

statute and defeat its policy; which is not allowable. Mr. Justice Thompson says, in *Ogden v. Saunders*, (12 Whea. 213, 298,) "The contract is a law which the parties impose upon themselves, subject however to the paramount law—the law of the country where the contract is made."—(See, also, *Renner v. Bank of Columbia*, 9 Whea. 586; *The Bank of Columbia v. Oakley*, 4 Whea. 235; *Bronson v. Kenzie*, 1 How. 311, 319; *McCracken v. Hayward*, 2 How. 608, 612.) The sale in this case having been made directly to Mrs. Blount, a married woman, since the passage of the act of February 13, 1850, above referred to, (to go no farther back), was such a sale as must be governed by the law of such sales at the time this was made. This made the estate a separate estate in the wife under the statute.—(Rev. Code, § 2371, 2382, 2388.)

The law of the Code defining the separate estate of the wife and regulating her own and her husband's power over it, can not be said, in this instance, at least, to be obnoxious to that clause of the Constitution of the United States protecting the obligation of contracts. The contract of marriage is not a contract under its protection, and the notes were made long after the marital contract was modified by the law of the wife's separate estate, and, consequently, it must be controlled by it.—(*Dartmouth College v. Woodward*, 4 Whea. 518, 695, 696; 1 Bish. M. & Div. § 667, and cases *supra*.) A different construction of the law of the separate estate of the wife, it seems to me, would produce unnecessary confusion in her title to her estate. One portion might be held by deed or will to her separate use, which would take it out of the statute, and another might be held by deed or gift to her without words creating a separate estate or by descent, and this would bring it under the provisions of the statute. But if the statute effects *all* property held by the wife, at the time of the marriage, after the Code went into operation, or received by her after the marriage, and after the Code took effect, then no such confusion would happen, and the very broad expressions of the Code would have their proper and rational effect;

and the system of the wife's estate would be uniform and symmetrical; a purpose which the Legislature, no doubt, intended to effect. Besides, such a construction does not injuriously affect any contracts or any vested rights. Conceding this, there was no equity in complainants' bill, and the learned Chancellor, in the court below, did not err in dismissing it, with costs.

The decree of the court below is affirmed. The appellant, said John Bowen, will pay the costs of this appeal in this court and in the court below.

MURRAY AND BELL vs. THE STATE.

[INDICTMENT FOR BURGLARY.]

1. *Burglary; description of house broken into; what sufficient.*—A count of an indictment for burglary which describes the house alleged to have been broken and entered with burglarious intent, as "a building, belonging to the estate of John Whiting, deceased, in which goods, merchandise, &c., are kept for deposit," is sufficient, when it pursues the form laid down in the Revised Code.
2. *Same; count for burglary; by what not vitiated.*—A count in an indictment which alleges that the intent to steal with which the building was broken and entered, is not bad, because it also alleges that the intent was executed by a larceny of goods in the building.
3. *Juror; peremptory challenge of; how long remains open.*—On the trial of a felony, the defendant's right to a peremptory challenge of a juror is to be kept open until the juror is actually sworn. An acceptance (inadvertently made, by the defendant,) of a juror may be withdrawn, and the juror peremptorily challenged at any time before he is actually sworn.
4. *Stolen property, possession of, recent and unexplained; what evidence of.*—Possession of goods stolen from a house a short time after the theft, is competent evidence of the theft, if this possession is not shown to be innocent, and if the theft was connected with a burglary it is also competent evidence, so far as it goes, of the burglary also.

APPEAL from the City Court of Montgomery.
Tried before Hon. JOHN D. CUNNINGHAM.

The appellants, Murray and Bell, were indicted for burglary and grand larceny in separate counts of the same indictment.

The first count was *nolle prossed*. The second count charged a burglary committed in "a building belonging to the estate of John Whiting, in which goods, merchandise," &c., "were at the time kept for deposit," &c. The third count charged, that the appellants "broke into and entered a building belonging to the estate of John Whiting, deceased, in which goods, merchandise, silver ware, table service, furniture, clothing and trunks were at the time kept for deposit, and feloniously took and carried away three dozen silver tea-spoons, three dozen silver spoons, ten dozen silver napkin rings, four silver ladles," &c. &c., "of the value of more than one hundred dollars, the personal property of Mrs. Georgia E. Saffold," against the peace, &c. The fourth count was the same as the third, with the exception that it alleged that the breaking and entering was done "with the intent to steal."

There was a demurrer to the indictment as a whole—1st, because of a misjoinder of counts; it charging offenses not of the same character and not subject to the same punishment. There was also a demurrer to each count in the indictment—1st, because there was no legal averment of the ownership of the building; 2d, because there was no sufficient description of the building broken and entered.

The demurrers were overruled, whereupon the defendants pleaded not guilty. The bill of exceptions recites that "while the jury was being empaneled, and after a number of jurors had been challenged by the State and by each of the defendants, and before the jury was complete, and before the challenges of the State or either of the defendants had been exhausted, the counsel for the accused stated that he had discovered that one David Campbell was among the jurors, who had been accepted by both the State and the defense. Defendant's counsel then asked leave to peremptorily challenge said David Campbell,

whereupon the solicitor objected that the challenge came too late; that the counsel for the defendants had both expressed themselves as being satisfied with the jurors, as far as empaneled, and that Campbell was one of those jurors, which was a fact. Thereupon the counsel for the defendants stated to the court, that they had objected to said Campbell the moment they had seen him on the jury; that in passing upon the jurors, who were in two rows, one row behind the other, some were standing and some sitting; that the counsel had not noticed that said Campbell was on the jury when they answered satisfied; that they saw said Campbell while sitting in the other panel before the jury was ordered to be empaneled, and immediately decided to challenge said Campbell if he should be put upon the jury; and they further stated that they would have challenged him if they had seen him when he took his seat upon the jury; that they were appointed by the court to defend the accused, and asked that the defendants should not be prejudiced by the mere inadvertence of counsel whom they had no voice in choosing, and that the defendants were unwilling to have said Campbell on the jury."

"The court decided that said Campbell was regularly on the jury, and had been accepted both by the defendants and the State, and no objections had been made to him until the other jurors had been called and some of them passed upon by the State; but further announced to the defendants that if they would specify any objections to the juror, the court would allow them to challenge him notwithstanding. The defendants did not urge any objections to the juror, but still insisted that they had a right to peremptorily challenge him. The court refused to allow them to challenge said juror, and the defendants duly excepted."

The breaking and entering of the building, and its ownership as laid in the indictment, were proved. The proof showed, in substance, that the property mentioned in the indictment had been placed in trunks, which were deposited, in the latter part of 1870, in the house which was entered,

Murray and Bell v. The State.

and that the silver was seen for the last time in the trunks about the 15th of November, 1870, the last time they were inspected before the burglary, and shortly before Christmas the trunks were in the house, apparently undisturbed. On January 11th, 1871, Mrs. Saffold received a telegram from Selma enquiring if she had lost the silver-ware mentioned in the indictment, and on looking at the building it was discovered that it had been broken and entered, the trunks rifled, and the silver-ware stolen, &c. On January 11th, 1871, the defendants were apprehended in Selma, which is 45 miles from Montgomery, trying to sell the silver-ware, which was identified as that mentioned in the indictment, to a jeweler. They enquired at the time of the sale for crucibles, such as are used in melting metals, but being unable to buy any, returned with the silver-ware, the names on some of it having been erased and scratched, and some of the spoons and other things having been broken, &c., so as to give it the appearance of old silver. On some of the silver-ware, however, the names had not been erased or obscured.

The only explanation defendants gave of their possession, was that they "had bought it from a man on the Selma, Rome & Dalton railroad." There was no proof that the defendants had ever been in Montgomery prior to their being brought there under arrest. The ownership and value of the personal property and the venue were proved. It was also shown by W. H. Graves, one of the administrators, that the estate of John Whiting was in the hands of his administrators and not finally settled; that \$20,000 of property remained on hand to be distributed; that all debts had been paid, but that Whiting was bondsman for one Pollard on an administration bond for several hundred thousand dollars, and might be liable on that account, as also on a \$4,000 indebtedness for which the estate, in certain contingencies, might be liable. On neither of these matters, however, had any liability yet been fixed against the estate, nor had any claim on account of the same been filed or presented, &c.

The defendants, among other charges which were given, requested the following, which the court refused to give, and to which refusal the defendants excepted :

1st. If the jury believe the evidence of the witness Graves, they can not find the defendants guilty of burglary, as charged in the indictment.

2d. If the jury believe the estate of Whiting was solvent at the time of the burglary, and that all the debts had been paid, and that there was a balance of assets to the amount of \$20,000 in the hands of the administrators for distribution, then the building described in the indictment does not vest in the estate of John Whiting, deceased, but in his heirs.

3d. Unless the jury are satisfied beyond all reasonable doubt that the possession by the defendants (of the property alleged to have been stolen) was a recent possession, then the jury can not find the defendants guilty of any offense.

4th. If the evidence in this case is such as to permit the jury reasonably to believe that the house was broken two months before the silver-ware was found in the possession of the defendants, then the defendants' possession was not recent, and the jury must find the defendants not guilty.

The jury found the defendants guilty of burglary as charged in the indictment, and they were sentenced accordingly, and hence this appeal.

The ruling of the court as to the juror Campbell, the refusal of the charges asked, and the overruling of the demurrer, are now assigned as error.

JONES and FALKNER, for appellants.—1. The demurrer should have been sustained.—18 Ala. 358; 20 Ala. 83; 6 Ala. 664 Anderson's case does not militate against this. There was a *description* of the building entered.

2. The challenge to Campbell should have been allowed. 2 Nevada, 232; 3 Iowa (G. Green) 216; 4 Ohio, 350; 9 Fla. 215; 24 California, 11; 5 Leigh (Va.) 715; 1 Denio, 310; 2 Chandler, 181.

Murray and Bell v. The State.

3. The charges asked were correct expositions of the law applicable to the evidence, and should have been given. .

Attorney-General GARDNER, and SAYRE & GRAVES, *contra*.

1. *Anderson v. The State*, at January term, 1873, is conclusive as to the demurrer.

2. There is conflict in the authorities as to the right of peremptory challenge under the circumstances detailed in the bill of exceptions. The best exposition of the law on this subject is found in the case of *State v. Patton*, 18 Connecticut, p. 166, and upon that case we rely. The practice contended for by appellants would embarrass the administration of justice, and would give defendants more than their rights.

3. The principles settled in *Anderson's case*, *supra*, show that the charges as to the ownership of the building were properly refused. The other charges as to recent possession were either abstract, or sought to take away from the jury the determination of the question whether, under the evidence, the possession was recent, and have the court determine it as pure matter of law.—3 Greenl. Ed. § 32.

PETERS, C. J.—The first questions presented in this prosecution, as matter of error, arise on the demurrer to the indictment. The charge is burglary. The first count was abandoned. This left only three others still remaining—the 2d, 3d and 4th. The second count is in these words:

“The grand jury of said county further charge, that before the finding of this indictment, George Murray and Richard Bell broke into and entered a building belonging to the estate of John Whiting, deceased, in which goods, merchandise, silver-ware, table-service, furniture, trunks and clothing, were, at the time, kept for deposit, with intent to steal, against the peace and dignity of the State of Alabama.”

The objection to this count seems to be, that it does not

describe the "building" alleged to have been entered with sufficient legal accuracy. We think this objection is not well taken. The house was not a dwelling-house. It was merely a "building in which goods, merchandise, &c., were kept for deposit." This is the language used in the statute.—(Rev. Code, § 3695; *Ib.* p. 811; Forms of Indictments.) This is a sufficient description of the place where the goods were kept.—(Rev. Code, §§ 4112, 4119.) The allegation of the ownership of the building is not an element of the crime, and reference to it is only to increase the accuracy of the identity of the building. That it was a part of the estate of John Whiting, deceased, was a sufficient description of the ownership. Precise accuracy in this particular is not required.—*Anderson v. The State*, ante, p. 665; see, also, Rev. Code, § 4127.

This objection is also made to the third and fourth counts, but for like reasons as the above it must fail. In addition to the facts stated in the statutory form of an indictment for burglary, the third and fourth counts in this case allege that the intent to steal was consummated by an actual theft. This does not vitiate the indictment. *Wolf vs. The State*, June term, 1873. The demurrers, then, were properly overruled.

I next proceed to dispose of the question raised upon the defendants' right to a peremptory challenge of a juror, which was refused them in the court below. Undoubtedly this is a right that may be waived by the prosecution or by the defendant.—*Murphy vs. The State*, 37 Ala. 142; also, *Lyman vs. The State*, 45 Ala. 72. In the former case last above cited, the court say: "The prisoner has no right to complain that the State forbears to exercise the right to challenge," as it is a matter of election, and may or may not be indulged. And in the latter case it is said that the right is one regulated by law. These determinations show that until the right to challenge is waived it should be enforced. We are now called on to consider what amounts to a waiver of this right, which should bind the party making it? This question has not heretofore been pre-

Murray and Bell v. The State.

cisely settled by any direct adjudication of this court. It is reasonable to conclude, that in a waiver, as in a contract, the intent of the party making it, is the principal thing. When this intent is based upon a presumption, this presumption is very much weakened, if it appears that the presumed waiver is injurious or likely to become injurious to the party making it, particularly when it involves the liberty of the persons making the waiver in unexpected peril. The bill of exceptions shows enough to make it evident, that the defendants did not intend to waive their right of challenge as to Campbell as a juror. Their peremptory challenges were not exhausted. They were evidently taken by surprise in finding him retained on the panel of their triors. They had not in fact elected him for this important purpose. They had not given any intelligent and intentional acceptance of his election as a juror in the case. Blackstone lays down the rule at common law to be this, as to the mode of challenges: "Where the trial is called on, the jurors are to be sworn as they appear to the number of twelve, unless they are challenged by the party."—4 Bla. Com., marg. p. 352, 353. This evidently means that the right of challenge is open until the juror is sworn. Under this rule, if the objection comes before the juror is sworn, it comes in time. If it comes in time, it must be allowed.—Rev. Code, § 4178. Here this was the case. I do not think there was any intelligent and intentional waiver before this time, in this case.

The admitted conflict of decision on this question in the different States of the Union, and the great and jealous tenderness which the law indulges towards the life and liberty of the citizen, seem to justify this court in giving this rule its most liberal interpretation. We, therefore, adopt the unanimous declaration of the Supreme Court of Ohio, and say, that the right of the peremptory challenge of a juror in a prosecution for a felony involving the liberty of the accused, in favor of the defendant, should be held open for the latest possible period—to-wit, "up to the actual swearing of the juror."—*Hooker v. The State*, 4 Ohio,

348, 350; also, *Bac. Abr. Jury*; *People v. Bodine*, 1 Denio, 281; *Commonwealth v. Hendricks*, 5 Leigh, 709, and cases cited in appellant's brief.

There is nothing in the refusal of the charges asked by the defendants on the trial below which would justify a reversal. These charges asked a construction of the evidence, which was not justified by any well settled legal principles. The description of the building which was entered with burglarious intent was sufficient, as has already been shown in discussing the demurrer, which involved this question. And the possession of the goods taken from the building broken by the burglars was competent evidence of guilt, when not so explained as to show that it was an innocent possession.—1 Greenleaf Ev. § 34. The evidence tended to show that the house was broken and entered late in November or December, 1870, and that the goods were not shown, by the prosecution, to be in the defendant's possession until in January, 1871. It is insisted that such a possession is not sufficiently recent as to justify the jury in resting a conviction upon it. I know no rule of evidence that circumscribes such facts to this extent. Unexplained possession of the stolen articles is evidence of guilt. And it is for the jury to say whether it is sufficient or not. They are the judges of its force. If the defendants committed the theft of the goods, and the goods were in the house broken, as the proof shows, this was evidence of the burglary as well as the larceny. And the jury could give it what force they thought fit. The court could not exclude it by a charge. This latter purpose seems to have been the object of the defendants in asking the charge on this point, which was refused.

For the error in refusing the challenge as above shown, the judgment of the court below is reversed and the cause is remanded for a new trial in conformity with law.

SAFFOLD, J., not sitting.

NOTE BY REPORTER.—The opinion in this case was delivered at the June Term, 1873. It is here inserted by direc-

Bell and Murray v. The State.

tion of the Chief Justice, in advance of the other opinions delivered at the same term, as it settles an important question of practice in the criminal law.

BELL AND MURRAY vs. THE STATE.

[INDICTMENT FOR BURGLARY AND GRAND LARCENY.]

1. *Rev. Code, § 3695; what averment in indictment under, constitutes charge of grand larceny and not of burglary.*—Under § 3695 of the Revised Code, a count in an indictment which charges that the defendants “broke into and entered” a certain described building, mentioned in that section, and “feloniously took and carried away” certain specified personal property of a third person, “of the value of more than one hundred dollars,” is a count for grand larceny and not for burglary. To constitute a good count for burglary, there should have been an averment that the breaking and entry were “with intent to steal or to commit a felony.”
2. *Same; what count charges burglary only.*—A count which charges that the defendants “broke into and entered” a certain described building, included in § 3695 of the Revised Code, “with the intent to steal,” charges burglary only, and under such a count there can be no conviction for grand larceny.
3. *Same; what count charges both burglary and grand larceny.*—Under a count charging that the defendants “broke into and entered” a certain described building, mentioned in § 3695 of the Revised Code, “with the intent to steal,” and “feloniously took and carried away” certain specified articles of personal property of a specified third person “of the value of more than one hundred dollars,” there may be a conviction for either or both of the offenses charged.
4. *Conviction for grand larceny and burglary had under one count; what punishment awarded.*—Where there is a conviction of both burglary and grand larceny, charged in the same count, but one punishment should be awarded.
5. *Merger; what offences not subject to doctrine of.*—Burglary and grand larceny being, under the provisions of the Revised Code, distinct felonies of the same grade and subject to the same nature of punishment, are not subject to the doctrine of merger.
6. *Conviction of one of two felonies charged in separate counts of indictment; effect of, as to felony not passed on by jury.*—A verdict finding the de-

defendants guilty of burglary on the trial of an indictment charging, in separate counts, both burglary and grand larceny, is tantamount to an acquittal of grand larceny, and thereafter expunges that charge from the indictment.

7. *Same; acquittal, by what not impaired.*—The acquittal thus obtained is final, and not impaired by a judgment rendered by the appellate court, on the defendants' appeal, reversing the conviction for burglary and remanding the cause for further proceedings.
8. *New trial on reversal; on what charge defendant is liable to be retried.*—The acquittal of grand larceny on the first trial being final, and in contemplation of law obliterating that charge from the indictment, takes away any legal foundation for a verdict on the second trial, finding the defendants "guilty of grand larceny, as charged in the indictment."
9. *Same; what will operate an acquittal.*—Such a verdict is a nullity, and is no legal reason for discharging the jury from their deliberations on the charge of burglary, the only one remaining in the indictment. If the jury are discharged because of the rendition of this void verdict, without the consent of the defendants, the discharge operates an acquittal of the burglary.
10. *Acquittal; when supreme court will order discharge of defendants from custody on reversal of judgment of lower court.*—In the case at bar, defendants having been acquitted of grand larceny on the first trial, and the unauthorized discharge of the jury, on the second trial, being tantamount to an acquittal of the charge of burglary, the whole indictment was disposed of, and the defendants thereby entitled to their discharge. Such a motion, having been made and overruled in the court below, the supreme court on appeal reversed the judgment and sentence of the court below, and caused the appropriate order to be entered in this court, discharging the defendants.

APPEAL from the City Court of Montgomery.

Tried before Hon. JOHN D. CUNNINGHAM.

The indictment in this case contained four counts. The first count was *nolle prossed*. The second count charges that the defendants, Bell and Murray, "broke into and entered" a building which it described, in which "goods, merchandise, trunks, silver-ware, &c., were at the time kept for deposit, with the intent to steal," against the peace, &c. &c. The third count charged that the defendants "broke into and entered a building," described in the count, in which merchandise, silver-ware, trunks, &c., "were at the time kept for deposit, and feloniously took and carried away" certain specified articles of personal property, of the value

Bell and Murray v. The State.

of more than one hundred dollars, the property of Mrs. Georgia E. Saffold," against the peace, &c. The 4th count was identical with the third, with the exception that it charged that the breaking and entering were done "with the intent to steal."

At the spring term, 1873, of the city court, the defendants having gone to trial on plea of not guilty, were convicted of burglary. The verdict of the jury was, "we, the jury, find the defendants, Richard Bell and George Murray, guilty of burglary." The judgment entry, after reciting the empanneling of the jury on the 26th of March, 1873, the defendants' plea, &c., and the verdict of the jury, concludes, "and the said defendants were remanded to jail to await the sentence of the court." The record shows, that on the 2d of April, 1873, the court sentenced the defendants in accordance with the verdict. There is nothing in the record or bill of exceptions to show that the defendants either consented or objected to the discharge of the jury.

The criminating evidence against the defendants on that trial, was the recent and unexplained possession of the stolen property, taken at the time of the burglary, which property Bell and Murray were endeavoring to sell under very suspicious circumstances at the time of their arrest. The defendants appealed to the supreme court, which "reversed and annulled the judgment and sentence of said city court," and remanded the cause "to the said city court for further proceedings therein," on the ground that the court below erred in not allowing the defendants a peremptory challenge to a juror.—See the case reported *ante*, on page 675, which, for convenience of citation, has been called *Murray and Bell v. The State*.

At the spring term, 1873, of the city court, when the case was again called for trial, the defendants pleaded their joint and separate plea of *autre-fois acquit* as to each and all the charges of grand-larceny contained in the several counts of the indictment. This plea was, in short, by consent, and was based upon the verdict and matters and things of record on the former trial, including the bill of

exceptions then reserved, and the judgment of reversal rendered by the supreme court. The court sustained a demurrer to the plea, and the defendants pleaded not guilty to the indictment, and went to trial on issue joined by the State on that plea. By consent, the testimony contained in the bill of exceptions, reserved in the former trial, was introduced in evidence, and that was all the evidence offered. The verdict of the jury was, "we, the jury, find the defendants guilty of grand-larceny as charged in the indictment, and recommend them to the mercy of the court."

The defendants moved in arrest of judgment, on the ground that it appeared from the records of the court in the identical cause, that the defendants had at a former term been acquitted on the identical indictment in the present case, of the identical and same offense of which the jury found them guilty in the present case, which acquittal was still of force, &c. &c.

They also moved the court to discharge them from custody, and to render judgment of acquittal, notwithstanding the verdict, of all the charges contained in the indictment, on the ground that the proceedings in the former trial were equivalent to an acquittal of the charge of grand-larceny, and the proceedings on the second trial were equivalent to an acquittal of the charge of burglary; whereby the whole case was at an end, &c.

The court overruled both of these motions and sentenced the defendants, in accordance with the verdict, for grand larceny.

The defendants appeal, and here assign for error—

1. Sustaining the demurrer to the plea of *autre-fois acquit*.
2. Overruling the motion in arrest of judgment.
3. The refusal to discharge the defendants.

THOS. G. JONES, and J. M. FALKNER, for appellants.—1. None of the counts which did not charge the breaking and entry to have been felonious, or in the language of § 3695

of the Rev. Code, "with the intent to steal or to commit a felony," charge burglary. The breaking and entry may have been lawful, as where a man breaks into a house to extinguish a fire in the building, and afterwards commits a larceny. Where the intent with which the breaking, &c., is done, is not directly alleged, the court can not say as matter of law that *burglary* is charged. A *jury*, on the facts charged in the 3d count, might find either a verdict of burglary or not as they found the *intent*. If this be so, all presumptions being solved against the indictment and in favor of the defendant, the court cannot hold that count as charging burglary.—*State v. Merrick*, 19 Maine, 398; Arch. Crim. Pleading, vol. 2, p. 328; 2 Hale, 184. As to difference between alleging the fact of an unlawful intent and the facts from which it arises, see *Bliss v. Anderson*, 31 Ala. 625.

2. The verdict of "guilty of burglary," on first trial, operated an acquittal of all the charges of larceny.—3 Ala. 200; 6 Ala. 200; 28 Ala. 82.

3. A judgment on conviction or acquittal, is not necessary in order that either may constitute a bar to another indictment for the same offense.—14 Ohio, 295; 5 Yerger, 24; 25 N. Y. 506; 44 Ala. 10; 43 Ala. 402.

4. Burglary and larceny are separate and distinct offenses; neither is a grade or degree of the other.—2 Hale, 245; 46 Ala. 721; 24 Conn. 57.

5. These offenses are not subject to the doctrine of merger under our law.—*Hamilton v. The State*, 36 Indiana, 286; Whart. Am. Crim. Law, vol. 1, § 564; 29 Ala. 62.

6. The jurisdiction of the supreme court, on appeal, in a criminal case, arises from the statute and the waiver by defendant of so much of his constitutional right not to be twice tried for the same offense, as will give it the right to order retrial. The waiver will not be presumed to go beyond defendant's necessities. The appeal was not from the acquittal of larceny, but from the conviction of burglary. If defendants had been wholly acquitted no court would have had jurisdiction of an appeal, and the principle is not different

as to the offense of which the defendants were acquitted, because at the same time there was a conviction and sentence for another offense.—*Hurt v. State*, 25 Miss. 374; 1 Bishop Crim. Law, (Ed. 1857,) § 677; 40 Ala. 14. There is no warrant in the constitution authorizing a court to require a defendant to barter away his acquittal as the price of the revision of an illegal conviction.

7. On the second trial defendants could not be retried for the offense of which they had been acquitted by reason of the verdict and proceedings on the first trial. They should have been tried for *burglary* alone.—*Campbell v. The State*, 9 Yerger, 338; *Martin v. State*, 30 Wiscon. 222; *Gilmore v. State*, 4 Cal. 337; *State v. Ross*, 25 Missouri, 32; *State v. Kettleman*, 35 Missouri, 105; *Gunther v. People*, 25 N. Y. 406; *State v. Tweedy*, 11 Iowa, 351; *Mounts v. State*, 14 Ohio, 295; *Morman v. State*, 24 Mississippi; 1 Swann, 14; 6 Humphries, 410; 2 Tyler, 471; 2 Va. Cases, 311; 16 Illinois; 8 Robinson (La.) 588; 13 Texas, 185; *United States v. Keen*, 1 McLean, 429; 8 Smedes & Marshall, 576; 4 Scammon, 168; 7 Blackford, 186.

8. No charge of grand-larceny being contained in the indictment on the second trial, the verdict of guilty of grand-larceny on that trial was a nullity. It was no reason for the discharge of the jury. That discharge was unauthorized and operated an acquittal of the burglary. Having been acquitted of larceny on the first trial, and the discharge of the jury on the second trial being equivalent to an acquittal of the other charge, the whole case is ended and the defendants entitled to their discharge.—*McCauley v. State*, 26 Ala.; *Ex parte Vincent*, 43 Ala. 402; *Grogan v. The State*, 44 Ala. 10.

Attorney-General GARDNER, and SAYRE & GRAVES, *contra*.—On an appeal of a case to the supreme court, and a reversal thereof, the case stands precisely as though a new trial were granted, or as though it had never been tried, and the court must try it over as it originally did, unless some count in the indictment is decided by this court to be bad.

In North Carolina and South Carolina, where a defendant is acquitted upon one count of an indictment and convicted on another, and appeals, if a *venire de novo* is awarded it must be to retry the whole case.—*The State v. Stanton*, 1 Iredell, 424; *The State v. The Commissioners*, 3 Hill, S. C. 239.

Where a defendant being indicted for burglary and larceny, according to the ordinary form, in one count, was acquitted of the burglary but convicted of the larceny, and obtained a new trial, it was held that the revision of the case pervaded the whole indictment, and that on the second trial he was to be arraigned on the burglary as well as the larceny portion of the count.—*State v. Morris*, 1 Blackford, 37.

So the circuit court of the United States for the eastern district of Pennsylvania held, that after a new trial on a conviction for manslaughter, the charge of murder was reopened.—*U. S. v. Hardin*, 6 Penn. L. J. 23; 1 Wall. p. 127. In this case Justice Grier says, to a party of prisoners who applied for a new trial, having been convicted of manslaughter in said court, "Let me now solemnly warn you to consider well the choice you shall make; another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeit to the law, * * * * and when your solemn election shall have been put upon record, the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you."

In burglary and larceny, where, after the acquittal of the greater offense, but conviction of the less, a new trial is granted, the whole case is said to have been opened, and the defendant exposed on the second trial to the double charge.—*The State v. Morris*, 1 Blackf. 37; *Morris v. The State*, 8 S. & M. 762; *Esmon v. State*, 1 Swann (Tenn.) 14; *State v. Kittle*, 2 Tyler, 471.

The decisions in this State on which the defendants will rely, are *The State v. Coleman & Owen*, 3 Ala. p. 14, and *Martin & Flinn v. The State*, 28 Ala. 71. The point decided

in these cases was not made by the record, nor did it come into question in either case. Besides, they are not applicable to the case at bar; these and all the other decisions cited by the defendants' counsel, it will be observed by the court, are cases where the conviction was of a lower grade of offense, and the court held that it amounted to an acquittal as to the higher grade of offense, and the authorities are by no means uniform as to this doctrine, and we do not think it the settled law of the land.

But the defendants do not cite a *single case* where a conviction of a higher offense is a bar to a prosecution for a lower offense, of a kindred kind, because the smaller offenses are embraced in the greater. This is a conviction of burglary, as in the case at bar, and includes all the minor offenses of a kindred kind; it includes that of grand-larceny.

Take, for instance, the case of Stokes, which so recently engaged the public mind. He was first found guilty of the *murder* of Fisk; the case was reversed by the New York court of appeals. On a second trial, he was convicted of *manslaughter*. Do we hear of any plea on his behalf, on the second trial, that he was *acquitted* of manslaughter by the first verdict, of *murder*? Do we hear of any motion in arrest of judgment on the above ground? Would the court have entertained a plea so contrary to all reason. Such a decision would be the abrogation of the criminal code. Take an appeal as in the case at bar, on some technicality, have the case reversed, then plead a former acquittal as to all the counts in the indictment, except the one found on, then risk the jury finding on some other count; if they miss it on the first appeal, try it again and again, and finally it would be impossible to convict, it matters not what would be the magnitude of the crime.

The proposition asserted, virtually, by the defendants' counsel is, that *two convictions* are in fact an acquittal.

BRICKELL, J.—A paradox is a proposition seemingly absurd, yet true in fact. An instance is, that under the

constitution and laws of Alabama, and under an indictment charging the defendant with two distinct felonies, two verdicts rendered at different terms of the primary court, the first expressly finding him guilty of one of the felonies, the second expressly finding him guilty of the other, may, when accompanied by an unauthorized discharge of the second jury, amount to an acquittal, and operate as such.

Section 9 of Article 1 of our State constitution, provides: "That no person shall be accused, arrested, or detained, except in cases ascertained by law and according to the forms which the same has prescribed; and that no person shall be punished but by virtue of a law established and promulgated prior to the offense, *and legally applied.*"

Section 2 of Article 6 of that constitution, is in the following words: "Except in cases otherwise directed in the constitution, the supreme court shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations, not repugnant to this constitution, as may from time to time be prescribed by law."

The restrictions and regulations as to the appellate jurisdiction of the supreme court in criminal cases have been prescribed by law and are contained in Chapter xii, Title 3, Part iv, embracing §§ 4302 to 4316, inclusive, of the Revised Code of Alabama. Section 4302 declares that any question in law arising in any of the proceedings in a criminal case tried in the circuit or city court may be reserved by *the defendant, but not by the State*, for the consideration of the supreme court, and if the question does not distinctly appear on the record, it must be reserved by bill of exceptions duly taken and signed by the presiding judge as in civil cases. By the sections of the Code above recited, the defendant in any criminal case, but not the State, may take the case to the supreme court by appeal or writ of error; and in any case taken to the supreme court under the provisions of said chapter, no assignment of errors, or joinder in error, is necessary; but "the court

must render such judgment as the law demands;" and if it reverses the judgment of the primary court, may order a new trial, or the discharge of the defendant, "or make such other order as the case may require."—Rev. Code, § 4314; 4316.

In the language of Chief Justice Gibson, "our jurisprudence abounds with unreasonable advantages enjoyed by the accused. The least slip in the indictment is fatal; *a new trial cannot be awarded after an acquittal produced by the most glaring misdirection*; and the prisoner is to be acquitted whenever there is a reasonable doubt of his guilt. These, and many other unreasonable advantages, the law allows on principle of humanity or policy." * * * * * "But feeling as I do, a horror of judicial legislation, I would suffer any extremity of inconvenience, rather than step beyond the legitimate province of the court, to touch even a hair of any privilege of a prisoner," &c., &c.—*The Commonwealth v. Lester*, 17 Serg. and Rawle, 164.

The indictment here to be considered was found at the February term, 1873, of the city court of Montgomery, and consists of four counts. The first count was *not pressed*. The second charges that the defendants "broke into and entered a building," described in that count, "with the intent to steal." The third count charges that the defendants "broke into and entered a building" described as in the second count, "and feloniously took and carried away" certain specified articles of personal property of a specified third person "of the value of more than one hundred dollars." This third count contains no averment as to the intent with which the defendants broke into and entered the building. The fourth count charges that the defendants "broke into and entered a building," described as in the second and third counts, "with the intent to steal, and feloniously took and carried away" personal property, as described in the third count, "of the value of more than one hundred dollars."

Under § 3695 of our Revised Code, which defines burglary differently from the common law, the second count is a

Bell and Murray v. The State.

count for burglary only, and does not include, nor authorize a conviction for the offense of grand larceny.—*Fisher vs. The State*, 46 Ala. 720.

Under the definition of burglary, contained in that section of the Code, the third count is not a count for burglary, because it contains no averment that the defendants broke into and entered the building “with intent to steal or to commit a felony.” An averment of the existence of the intent to steal or to commit a felony, at the time they broke into and entered the building, was essential to make that count a good one for burglary.—*Oliver v. The State*, 17 Ala. 587; *Ogletree v. The State*, 28 Ala. 693; *Moore v. The Commonwealth*, 6 Metc. R. 243. As that count did not contain such averment, it is a count for grand larceny only. The fourth count is a count for burglary and grand larceny; and under it, the defendants might on the first trial have been convicted of either, or of both of these offenses. But if they had been convicted of both, under that count, there could have been but one penalty, because, in that event, the merciful and just construction in favor of the defendants would have been, that as both offenses were charged in the same count, they should be deemed as “one continued act,” for which but one penalty could be adjudged.—*Josslyn v. The Commonwealth*, 6 Metc. R. 236.

Under our Code, burglary and grand larceny are distinct felonies of the same grade, subject to the same nature of punishment, and may be joined in the same indictment, but are not subject to the doctrine of merger.—*Johnson v. The State*, 29 Ala. 62; *Hamilton v. The State*, 36 Ind. 286; *Wilson v. The State*, 37 Ala. 134; Whar. Amer. Crim. Law, vol. 1, § 564.

When the defendants were put on trial under this indictment, at the February term, 1873, of the city court of Montgomery, and evidence as to their guilt was submitted to the jury, they were in jeopardy, both as to burglary and larceny; and might have been convicted and punished for both under the distinct counts of the indictment.—*Josslyn v. Commonwealth*, 6 Metc. R. 236.

If on that trial the verdict of the jury had been, "we, the jury, find the defendants guilty as charged in the indictment," or, "we, the jury, find the defendants guilty of burglary and grand larceny as charged in the distinct counts of the indictment," they certainly could have been tried again for both burglary and grand larceny, after they had brought the case to this court and procured a reversal of the judgment of the city court.

But on that trial, the verdict was, "we, the jury, find the defendants, Richard Bell and George Murray, guilty of burglary." That verdict was received by the city court, and judgment and sentence thereon entered by that court, against the defendants, to the effect that each of them be confined in the penitentiary for specified periods.

The defendants thereupon took the case to the supreme court under the provisions of the Code above cited. And at the June term, 1873, this court reversed the said judgment and sentence of the city court and remanded the case to that court "for further proceedings."

As the indictment was for burglary and grand larceny, and the verdict was only for burglary, the necessary intendment of the finding was, that the defendants were not guilty of the alleged larceny. "As to all which is not found, the conclusion must be, that the jury intended to acquit."—*Nancy v. The State*, 6 Ala. 483; *Nabors v. The State*, 6 Ala. 200; *Burns v. The State*, 8 Ala. 313; *Martin and Flinn v. The State*, 28 Ala. 72, and authorities cited in appellant's brief.

The legal effect of that verdict of acquittal of larceny, whether any judgment was rendered on it or not, was to put the alleged larceny as completely out of the indictment and case, as if it had never been in the indictment or case. *Mount v. The State*, 14 Ohio, 295; *Shepherd v. People*, 24 New York, 406; *The State v. Martin*, 30 Wisconsin, 223; *People v. Gilmore*, 4 Cal. 376; *Hurt v. The State*, 25 Miss. 378; *Campbell v. State*, 9 Yerger, 333; 1 Bish. Crim. Law, (Ed. 1856,) § 676; *State v. Ross*, 29 Missouri, 32; *Jones v. State*, 13 Texas, 168; *Morris v. State*, 8 Smedes and Marshall, 762, and authorities in appellant's brief.

Bell and Murray v. The State.

The case, when brought by the defendants to this court at its June term, 1873, had by the aforesaid proceedings in the city court, become a case for burglary only. This court was bound to treat it as such; and in reversing the judgment and sentence of the city court at the instance of the defendants, the supreme court had no jurisdiction to deprive them of the advantages which the law gave them as the result of the final verdict. The jurisdiction of this court in the case as brought, was appellate only. As the case when brought here, had become one for burglary only, it remained a case for burglary only when remanded to the city court.—Authorities, *supra*.

After the case was thus remanded, the city court, in effect, required the defendants, not only to be tried for the alleged burglary, but again to be put in jeopardy for the alleged larceny, of which they had been acquitted as aforesaid. They were put on trial for both burglary and grand larceny, precisely as if there had been no former trial or former verdict. On this trial at the February term, 1874, of the city court, the same evidence which had been introduced on the former trial was introduced, but the verdict was, "we, the jury, find the defendants guilty of grand larceny as charged in the indictment," "and recommend them to the mercy of the court." The city court received this verdict, remanded the defendants to jail to await sentence and discharged the jury. No consent of the defendants to this discharge of the jury appears, and such consent cannot be presumed.

If this last verdict were of any validity, its undoubted effect and meaning in law would be, that the jury found the defendants not guilty of burglary. But that verdict is a mere nullity, because the charge of grand larceny had been put out of the case by the verdict and proceedings on the former trial.—*Fisher v. The State*, 46 Ala. 721.

A verdict which is a mere nullity, is no legal reason for the discharge of the jury. And when, as here, that is the only reason for the discharge of the jury, and there is no evidence that the defendants consented to such discharge,

the legal effect of such discharge is the acquittal and discharge of the defendants from any further prosecution for the offense or offenses set forth in the indictment.—*Ex-parte Vincent*, 43 Ala. 402; *McCauley v. State*, 26 Ala. 135.

It is not the verdict finding defendants guilty of grand larceny on the last trial, which acquits them of burglary. At the time of that trial, there remained in law no such charge as grand larceny in the indictment. That which acquits defendants on the last trial, is not the void verdict, but the discharge of the jury, charged with the trial of defendants for burglary, without necessity and without their consent. The void verdict had no effect. The jury should have been instructed to have returned to their deliberations. As the jury was not so instructed, but was discharged without a verdict on the only charge by law it was authorized to consider, and without consent of defendants, that dispersion of the jury operated an acquittal. So, on the first trial, when defendants were in jeopardy for both burglary and larceny, the discharge of the jury without rendering a verdict as to larceny, and without consent of defendants, (although it did render a verdict as to burglary), operated an acquittal of the larceny. This is one of the strongest and most logical reasons for the rule, that where defendants are put on trial on several counts, and the jury find only as to one, the defendants are thereby acquitted as to the others.

It is a settled rule in this State, that the unauthorized discharge of a jury, charged with the trial of a defendant in a criminal case, is tantamount to his acquittal of all the alleged offenses upon which the jury did not expressly pass or were prevented from passing by the unwarranted discharge. From this rule it follows, that where two charges are contained in an indictment, and on the first trial there was a discharge of the jury without necessity and without consent of defendants before the jury had passed, and whereby they were prevented from passing on the first offenses, that discharge is tantamount to an acquittal of the offense not passed on. If, on the second trial, the jury, which

Bell and Murray v. The State.

then, *in law*, are charged to inquire into the second offense only, are discharged without necessity, and without defendants' consent, that discharge operates an acquittal of the second and only remaining offense, whereby defendants are freed from the whole charge.

Strictly speaking, then, it is not the two verdicts against the defendants in the present case, which operates an acquittal, but the unwarranted discharge of the jury on the last trial, as shown by the record.

We have been aided in our investigations of this case, and the important and delicate questions it involves, by the elaborate and exhaustive briefs of the counsel for the appellants, creditable to their industry and discrimination. To these we refer as containing the citation of many authorities not cited in this opinion, sustaining the conclusion we have reached.

The judgment of the city court is reversed, and a judgment must be here rendered discharging the appellants.

SAFFOLD, J., not sitting, being related by marriage to the prosecutor.

[NOTE BY THE REPORTER.—The opinion in this case was delivered at the June term, 1874, by Justice R. C. Brickell, who was appointed in 1873 by His Excellency, Gov. Lewis, to fill the vacancy occasioned by the resignation of Chief Justice Peck. The case is here reported in advance of other decisions at the same term by direction of the Chief Justice, owing to its importance in the administration of the criminal law.]

STOUDENMIRE *vs.* BROWN.

[EJECTMENT—TAX DEED.]

1. *Revised law of 1868; section 93 of; unconstitutionality of.*—Section 93 of the Revenue Law of 1868, which requires the owner of land sold for taxes to deposit double the amount of the purchase-money, &c., before he shall be allowed to prosecute or defend any suit for the same against the purchaser, is unconstitutional.
2. *Same; § 87 of; what part not unconstitutional.*—Section 87 of the same act is not violative of the State constitution in declaring that a tax deed shall be *prima facie* evidence of certain facts mentioned therein.
3. *Same; what part unconstitutional.*—But that portion of the said section which declares that such deed shall be conclusive evidence of the facts there enumerated, is unconstitutional.

APPEAL from the Circuit Court of Coffee.

Tried before Hon. J. McCaleb Wiley.

This was a real action in the nature of ejectment, under the Code, brought by appellants against appellee, Brown, in July, 1873, to recover possession of a tract of land described in the complaint.

The plaintiffs claimed under a deed dated July 24, 1873, made to them as purchasers at a tax sale in 1871, by the judge of probate of Coffee county, under sections 85 and 86 of the "act to establish revenue laws for the State of Alabama," approved December 31, 1868, the owner of the land having failed to redeem the same within two years. This deed was of the form and substance required by said section 86. The defendant claimed under a deed dated January 1, 1873, from one Noble, who had owned the land for fifteen years previous to the sale.

In order to a proper understanding of the case, it is necessary to revert briefly to certain provisions of the revenue law.

Section 19 provides that "it shall be the duty of each

person liable to taxation upon notice given by the assessor," as hereinafter stated, "to render to the tax assessor in writing a complete list of all items, and the value of each item, upon which they are liable to be taxed," &c.

Section 31 prescribes that the assessor must give notice of his appointments at least fifteen days, and by posting and publication, &c.

It is provided by section 34, that after the assessor shall have completed his sittings, "he shall make a demand in person, or by deputy, upon delinquent tax-payers, or such as shall have failed to meet him at his appointments, wherever he may find them, * * * and when unable to find them may leave written notice at the residence of each such delinquent," &c.

Section 49 is as follows:

"SEC. 49. *Be it further enacted,* That after the collector shall have completed his sittings for the collection of the taxes as required by section 45 of this act, he, or his authorized deputy, shall make a personal demand upon delinquent tax payers wherever they may be found, for the amount of their taxes, penalties and costs, and when unable to find them, shall leave a written notice at the place of residence of such tax payers; and it shall be the duty of such delinquent, within the next fifteen days, to make payment in full of their taxes, forfeitures and fees to the collector or his deputy."

It is further provided, that after the first of January in each year, the tax collector shall levy on and sell any personal property of delinquent tax-payers, and that where no personal property can be found, with reasonable search, the tax collector may proceed against real estate, in a mode prescribed, and which is not material to the points decided.

After a sale of property for non-payment of taxes, it is the duty of the tax collector, under section 72, to make out and deliver to the purchaser a "certificate of purchase," which shall show description of the real property—that such real property was assessed by the assessor, to whom assessed, the date of the assessment, for what year the

taxes are due, the amount of taxes, &c., and who became the purchaser, &c. If such property is not redeemed within two years, it is the duty of the probate judge to make a deed as prescribed in sections 85 and 86.

Section 87 is as follows:

"SEC. 87. *Be it further enacted*, That the deed shall be signed by the probate judge in his official capacity, and acknowledged by him before some officer authorized to take acknowledgments of deeds; and when substantially thus executed and recorded in the proper record of titles to real property, shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and also the right, title, interest and claim of the State and county thereto, and shall be *prima facie* evidence in all the courts of this State, in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts:

1. That the real property conveyed was subject to taxation for the year or years stated in the deed.

2. That the taxes were not paid at any time before the sale.

3. That the real property conveyed had not been redeemed from the sale at the time of the deed, and shall be conclusive evidence of the following facts:

1. That the property was listed and assessed at the time and in the manner required by law.

2. That the taxes were levied according to law.

3. That the property was advertised for sale in the manner and for the length of time required by law.

4. That the property was sold for taxes as stated in the deed.

5. That the grantee named in the deed was the purchaser.

6. That the sale was conducted in the manner required by law.

7. That all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to

have had, any part or action in any transaction relating to or affecting the title conveyed, or purporting to be conveyed by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser were done, except in regard to the three points named in this section, wherein the deed shall be *prima facie* evidence only. And in all controversies and suits involving the title to real property claimed and held under and by virtue of a deed executed substantially as aforesaid by the probate judge, the person claiming title adverse to the title conveyed by such deed, shall be required to prove, in order to defeat the said title, either that the said real property was not subject to taxation for the year or years named in the deed, that the taxes had been paid before the sale, or that the property had been redeemed from the sale according to the provisions of this act. But no person shall be permitted to question the title acquired by a probate judge's deed, without first showing that he or she, or the person under whom he or she claims titles, had title to the property at the time of the sale, and that all taxes due upon the property had been paid by such person, or the person under whom he or she claims titles as aforesaid: *Provided*, that in any case where a person has paid his taxes, and through mistake in the entry made in the tax collector's books, or in the receipts, the real property upon which the taxes were paid, was afterwards sold, the probate judge's deed shall not convey the title: *And provided further*, that in all cases where the owners of real property sold for taxes shall resist the validity of such tax title, such owner may show and prove fraud committed by the officer selling the same, or in the purchaser to defeat the same; and if fraud is so established, such sale and title shall be void."

"SEC. 93. *Be it further enacted*, That before any person claiming title to real property sold for taxes under this act shall be entitled to prosecute or defend any suit against any person claiming such property under any tax sale, he

shall deposit with the court having jurisdiction in the case, double the amount of the purchase money, together with all taxes and interest accruing since the sale, the value of improvements made by the purchaser, said improvements to be valued by three disinterested persons, and the probable amount of costs of suit."

There are other sections of the law as to the assessment, books, &c., which could not well be here set out without unnecessarily drawing out the report of the case.

The defendant's plea is not copied in the transcript, but it is stated in the bill of exceptions that defendant pleaded "not guilty of withholding the possession of said lands from the plaintiff." On the trial, "the plaintiffs moved the court to strike [out] the defendant's plea" and give them judgment, on the grounds, in substance, that they claimed under a deed made by the judge of probate, &c., after the time had expired for redemption, the land having been sold by the tax collector for non-payment of taxes, and defendant had not made deposit as required by § 93. In support of this motion, the plaintiff showed that no deposit had been made, and introduced a deed executed by the probate judge to the lands in controversy, under sections 85 and 86, and in strict compliance therewith, and in compliance with the requisitions contained in the first part of section 87. This deed had been duly recorded. The court refused "to strike out the defendant's plea or to require him to make any deposit, or to allow the plaintiff to have judgment, remarking that said section 93 was void," and to the action of the court the defendant duly excepted.

The plaintiffs then offered in evidence the tax deed from the judge of probate, hereinbefore referred to. This deed recited that the land in controversy "was subject to taxation for the year 1870, and that the taxes assessed upon said real property for the year 1870 remained due and unpaid at the date of the sale hereinafter named; that the tax collector did, on the 6th day of March, 1871, by virtue of the authority in him vested, offer for sale the premises, on the first Monday in March, 1871, at a public sale made

at the court-house, "in substantial compliance with all the requisitions of the statute in such cases made and provided, at which sale plaintiffs became the purchasers at a named price," &c. &c., [setting out all the facts required by law in such a deed,] and in accordance with the provisions of the statute conveyed the premises to the plaintiffs, who were the purchasers at said tax collector's sale.

The defendant introduced James Noble, who owned the premises in 1870, and sold them January 1st, 1873, to the defendant. Noble testified that he had not given in the lands for assessment and no demand had ever been made on him to give in the same for assessment; that at the time of the sale he owned, besides the land, \$250 worth of personal property, consisting of oxen, wagons, and other visible property, out of which the money could have been made to pay the taxes; that he knew nothing of the lands having been advertised until long after the sale; that he did not pay his taxes for 1870.

The deputy tax collector, who did all the business for the years 1870-71, testified that no personal demand was ever made on Noble for his taxes, and that he did not search for any personal property of Noble out of which to make the taxes, but that he sold the premises described in the deed for non-payment of taxes, and made a certificate of purchase. This witness further testified that he had examined the tax books, and that there was no assessment in it or in the supplemental assessment. The certificate of purchase made by the tax collector was introduced in evidence, and it showed a sale, in compliance with the revenue law, of the premises in question, and recited that the real estate "was assessed by J. C. Jolly, assessor of said county, on the — day of — 1870, as the property of J. H. Y. Noble."

The judge of probate testified that he was custodian of the books and records of said court, among which were the "tax books of real property of the county as made out by the tax assessor for the year 1870, and that he could not find, after careful search, any assessment made to James Noble in

said book. The plaintiffs objected to the introduction of all this evidence, and moved to exclude it as irrelevant, which objection and motion the court overruled and plaintiff excepted.

The court charged the jury, among other things, "that the tax law must be taken as a whole, and that in order to authorize the plaintiffs to recover in this action they must show by positive proof that the assessor and collector did every thing required of them by law and in the manner directed by law; that if the proof failed to show that the collector advertised and attended his collectings as required by law, and that he then called on Noble for his taxes; or that Noble had no personal property which might have been sold for the taxes, then the plaintiffs could not recover in this action. That a failure of the tax collector to perform every duty required by law and in the manner as the law directs, would be a legal fraud on the said Noble, and that the probate judge's deed would convey no title, and that the plaintiff would not be entitled to recover in this action on said deed; that section 87 of the revenue law of 1868 was utterly void."

The plaintiff excepted to this charge, and requested, in writing, charges in substance: that to defeat plaintiffs, defendant must prove either that the premises were not subject to taxation for the year named in the deed, or that the taxes had been paid, or the premises redeemed from sale in accordance with requirements of the revenue law of 1868.

2d. That defendant can not question the title acquired by the probate judge's deed without showing that the person under whom he claims had title at the time of the sale, and that all taxes due upon the property had been paid by him or the person under whom he claims.

3d. That defendant could not be permitted to show that the party whose land was sold for taxes, had sufficient personal property out of which to have made the taxes.

4th. That the duties of the assessor and collector as to giving notice, making demands, &c., as required by the

Stoudenmire v. Brown.

revenue law of 1868, are directory merely, and a failure to comply with them can not avoid a sale made for non-payment of taxes.

5th. That the jury can not consider any defense to this action, except such as are set out in section 87 of the revenue law.

The court refused to give either of these charges, and defendant duly excepted.

The various rulings of the court to which exception was reserved, the charges given, and the refusal to charge as requested, are now assigned for error.

J. E. P. FLOURNOY, for appellant.—The rule of evidence has been changed since the sale of the land, in *Thomson v. Rivers*, 43 Ala. pp. 6, 33; a change which was perfectly competent for the legislature to make.—§ 87 of revenue law of 1868.

The legislature certainly had a right to say what should be a valid sale, and what should be sufficient to make it void, and in doing so they had a right to declare that no mere irregularity should be sufficient to avoid the sale, or be let in to show fraud unless the purchaser was a party to such default or fraud. The court erred in letting the defendant prove any thing, except that the land was not subject to taxation for the year or years mentioned in the deed, or the taxes had been paid before the sale, or that the land had been redeemed from the sale. As to all other matters which seem to have been treated by the legislature as mere irregularities which are not considered of sufficient importance to effect the title conveyed or the right of the purchaser to recover, the legislature has declared that the mere recital of them in the deed shall be conclusive evidence that they were done and performed, and the letting in parole evidence to contradict such recitals is positively prohibited, as it would allow the deed to be attacked for mere irregularities which can not be done by said revenue law. And the law which forbids a collateral attack on a deed for mere irregularities, has be-

come a settled rule of property in this State.—See *Weir v. Clayton*, 19 Ala. 132, and authorities there cited, especially *Weir v. Bradford*, 20 Ala. 676.

It was right and proper that the legislature should provide some summary way of collecting the taxes, sufficient to carry on the government, and also to provide that a tax payer who did not pay his taxes should not be allowed to insist on mere irregularities to avoid the sale, and thus get out of paying his part of the necessary expenses of the government, while by the authority and protection of such government alone are all his rights of person and property protected.

Another authority—section 2014, Revised Code—makes letters of administration, &c., conclusive evidence, and this section has never been questioned as exceeding the limitation of the legislature.—See *Gray's Adm'r v. Cruise*, 36 Ala. 559, and authorities there cited. It is within the province of the legislature to change the rule of evidence in tax titles.—See *Lessee of Dun v. Gains & Gilbert*, 1 McLean's Ohio C. C. R. 322. Taxation is a sacred right, essential to the existence of the government; an incident of sovereignty. The right of legislation to attach it upon all persons and property within the jurisdiction of the State is co-extensive.—See *Dobbins v. The Commissioners of Erie County*, 16 Peters, 435.

Neither the record nor docket gives the name of appellee's attorneys.

B. F. SAFFOLD, J.

In ejectment by the purchasers of land, at a tax sale, against a subsequent purchaser from the owner, the plaintiffs insisted on the conclusiveness of their deed from the probate judge as evidence of the facts stated in the seven sub-divisions of § 87 of the revenue law of 1868. They also objected to any defense to their suit, unless the defendant would comply with the provisions of § 93 of the same law. The court decided that these enactments were unconstitutional.

The legislature has authority to enact rules of evidence, subject to the fundamental or constitutional law. The constitution of our State, as well as that of the United States, secures to every person a remedy by due process of law for the protection of his person, reputation and property. It also divides the powers of government into legislative, executive and judicial departments, and forbids any person or collection of persons, being of one of these, to exercise any power properly belonging to either of the others. These guaranties clearly prohibit the legislature from debarring a person the prosecution or defense of his right to his property in the courts of the State. A grantor's conveyance of his own property commits him to its recitals and stipulations, as his deliberate admission of the facts stated, and as his contract in respect to them, to a far greater extent than can be accorded to the conveyance of his property to another by a public officer. The former is the disposition which a person makes of his own property; the latter is generally an involuntary divestiture of his title.

The requisition which "due process of law," or, "the law of the land," makes, involves judicial as well as legislative action. This is, perhaps, by precedent and long practice, sufficiently obtained in respect to sales of property for taxes, by allowing to the owner the assertion of his rights in the courts after the sale has been made, when the revenue law contains no provision for such previous adjudication, as is secured in some of the States of the Union. Our law makes no such provision, but the probate judge is required, upon the return of the certificate of purchase, to make out a deed and deliver it to the purchaser. This deed, under the 87th section, is made conclusive evidence: 1st, That the property was listed and assessed at the time and in the manner required by law; 2d, That the taxes were levied according to law; 3d, That the property was advertised for sale in the manner and for the length of time required by law; 4th, That the property was sold for taxes as stated in the deed; 5th, That the grantee named

in the deed was the purchaser; 6th, That the sale was conducted in the manner required by law; 7th, That all the pre-requisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or action in any transaction relating to or affecting the title conveyed, or purporting to be conveyed, by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive. It is further provided in the same section, that no person shall question the title acquired by the probate judge's deed, without first showing that all taxes due upon the property had been paid.

In this case the defendant proved that no assessment of the property had been made, and, consequently, that no taxes had been levied on it. The certificate of purchase and the deed, therefore, contained statements which were false in fact. Without such assessment and levy the sale would be void.—Blackwell on Tax Titles, p. 154. Shall the deed prove beyond contradiction facts which had no existence? The act does not dispense with these pre-requisites. But the deed is made conclusive evidence that they were performed. We do not hesitate to say that such a rule of evidence is contrary to the guaranty of the Constitution.—Blackwell on Tax Titles, pp. 80, 82. Cooley characterizes it as not a law regulating evidence, but an unconstitutional confiscation of property.—Cooley's Const. Lim. 369. In *Allen v. Armstrong*, 16 Iowa, 508, a revenue statute, identical in terms with ours, in respect to the conclusiveness of the deed as evidence, was brought under partial consideration. The defendant did not controvert the assessment or valuation, and the levy of the tax. In reference to this the court said: "If any given step or matter in the exercise of the power to tax (as for example the fact of a levy by the proper authority) is so indispensable, that without its performance no tax can be raised; then that step or matter, whatever it may be, cannot be dispensed with, and with respect to *that* the owner cannot be *concluded* from showing the truth by a mere legislative

declaration to that effect." The power of the legislature to make the tax deed presumptive or *prima facie* evidence of the regularity and validity of all prior proceedings is admitted.—Blackwell on Tax Titles, 79; *Pillow v. Roberts*, 13 How. 476. The reason assigned is that the presumption of regularity may be rebutted by proof, and no real injury be inflicted. Perhaps this concession has been too readily yielded. The *onus probandi* ought to rest upon the party whose position renders him most capable of procuring the proof, or makes it most equitable or just that he should do so. We decide that so much of § 87 of the Revenue Act of 1868, as declares that the tax deed shall be conclusive evidence of the facts there enumerated, is unconstitutional.

The 93d section of the same act is but a corollary of the other; and is in violation of the Constitution.—*Conway v. Cable*, 37 Ill. 82.

The court held that the entire section 87 was unconstitutional and void. This was erroneous, and may possibly have effected some injury to the appellant. For this error the judgment is reversed and the cause remanded.

[NOTE BY REPORTER.—The opinion in the foregoing case was delivered at the June term, 1874, and is here inserted by direction of the Chief Justice, in advance of other cases decided at the same term, owing to the important questions passed on in the case.]

INDEX.

ACCOUNT.

1. *Account stated; what necessary to recover on.*—To enable a plaintiff to recover on a count upon an account stated, he must prove, either an actual accounting together, or—what the law holds to be equivalent—an admission by the defendant, expressed or clearly implied, that a fixed certain sum is due to the plaintiff by the party making the admission.—*Ryan v. Gross*. 370
2. *Same; what admissions will not change an open account to an account stated.*—If, when an account for goods sold is presented for payment, or to be settled by note, the party does not dispute or deny, but admits, the correctness of the items, but does deny his liability to pay, and refuses to pay or to settle the account by note, and insists that some other person is justly chargeable with and ought to pay the same; this will not change the character of the account from an open to an account stated, and thereby defeat the defense of the statute of limitations of three years.—*S. C.*
3. *Account; when will be decreed.*—Mrs. B., a widow in feeble health, with a family to provide for, in extreme and distressing poverty, earned \$446 in the year 1867 as a teacher in a public school in this State, for which she filed her account in a proper manner with the superintendent of the public schools of the proper county, but the payment of the claim thus filed was postponed and not made until April, 1870. Before it was paid, B., an influential and well informed merchant of the county, came to see her for the purpose of buying her claim. He represented to her that all the other teachers of the schools were selling their claims at fifty cents in the dollar; that the money to pay her claim had not been received by the superintendent, and might not be received in some months. Confiding in the truth of these representations, she sold her claim for fifty cents in the dollar, and received her pay. Shortly afterwards, she learned that B.'s representations were all false, and that he had deceived and cheated her, and that the money to pay her had been received, and that B. had opportunities to know it. She went to him and proposed to cancel the trade for her claim and tendered him back the money he had paid, but he refused to do this, and collected her claim and applied the funds to his own use.—*Held*, chancery had jurisdiction, and would compel B., the merchant, to account to the widow for the proceeds of her claim so gotten possession of by him.—*Balkum v. Breare* 75

ACTION.

1. *Action; dissolution of corporation; effect of, on its right of.*—The dissolution of a corporation in this State does not effect its right to sue and be sued, until the lapse of five years after such dissolution.—Rev. Code, § 1775.—*Tuskaloosa Art Association v. Green*. 346
2. *Action; who can not maintain suit in present State courts.*—A guardian appointed by the probate court of the rebel government having military control of this State in 1863, can not maintain an action as such guardian in the courts of this State, without a renewal of his appointment by the court of probate of the rightful State government.—*Troy v. Ellerbe*. 624
3. *"Party really interested;" action by, meaning of words as used in section 2523 of Revised Code.*—No fixed rule has been laid down, or probably can be, by which the meaning of the words, "the party really interested," as used in section 2523 of the Revised Code, can be certainly determined, as applicable to particular cases or to cases generally. Whether a party has, or has not, the legal title, if he is the party to whom payment can legally be made, and who can legally discharge the debtor, the action may be brought in his name, although the money, when collected, is not for his use, but is for the use of some other person or persons, to whose use he is required to apply it, or to whom he is bound to pay it.—*Yerby, Supt. v. Sexton et al.*. 311
4. *Action against county for damage from defective bridge; what allegation necessary.*—In an action against a county for damages occasioned by a fall from an imperfect bridge, established under contract with the commissioners court, made before the adoption of the Code of Alabama, the declaration should show that the bridge was a toll-bridge, and that the contract was such an one as the commissioners court had authority to make.—*Barbour county v. Horn*. 566
5. *Same; what must show.*—A complaint against a county to recover damages for a fall resulting from the insufficiency or unsafe condition of a public bridge, must set forth a statement of facts which show the existence of its special liability. Among other things, it must be stated that no guaranty had been taken from the builder of the bridge, or that such a guaranty had been taken, and that the time during which it was to continue had expired before the occurrence of the injury complained of.—*Barbour county v. Horn*. 650
6. *Revised Code, section 1396 of; to what action applies.*—Section 1396 of the Revised Code, which gives a right of action for injuries occasioned by defect in a bridge, &c., is applicable to a suit brought against a county for such injuries, although the bridge may have been built before the passage of the act, if the injury complained of occurred after its passage.—*S. C.*
7. *Action; what causes of, can not be joined in proceeding to subject estate of wife under section 2376 of Revised Code.*—A cause of action against the husband only, can not be joined with an action prosecuted against the husband and wife jointly, for the purpose of enforcing a liability against her separate estate for articles of comfort and support of the family.—*May v. Smith, Edwards & McKeithen*. 483

ACTION—CONTINUED.

8. *Action; what is in case and is sufficient.*—A complaint which sets forth that the defendants, as commission merchants, received from the plaintiff certain described goods for sale for a reward, under instructions not to sell them for less than a specified price, which they promised to observe, but that they did afterwards sell the said goods for less than that amount, to-wit, the sum of —, &c., is in case, and sufficiently states a breach of duty.—*Beavers v. Hardie & Co.* 95
9. *Indebitatus assumpsit; when will lie.*—Where the terms of a special unsealed agreement have been performed by the plaintiff, so that only a duty to pay money remains, *indebitatus assumpsit* will lie, but where the agreement is still open, or is to be performed in future, the count must be framed on the agreement.—*Darden v. James.* 33
10. *Action to recover damages for mule killed by runaway horse; what must be proved to entitle plaintiff to verdict.*—In an action for the value of a mule, killed by the shaft of a wagon of defendant, with which the horse was running away, it must be shown that the owner of such horse and wagon was negligent in permitting the horse to escape and run off with the wagon.—*Garlick v. Dorsey.* 220
11. *Detinue for slaves; when emancipation no defense to.*—To an action of detinue for the recovery of slaves, commenced in 1852, it is no defense that the slaves were emancipated before the trial.—*Wilkerson v. McDougal.* 517
12. *Same; what will defeat action.*—In such action, the plaintiff's right of recovery is defeated by the passage of his title to another before the trial, unless the defendant is a mere trespasser; but not by its extinction on account of the destruction of the property, whether by death, emancipation or otherwise.—*S. C.*
13. *Ejectment, action of; by what law governed.*—An action of ejectment commenced in 1852 is governed by the law of that action as it existed under Clay's Digest. Such an action should be conducted as at common law, except the fictitious proceedings are abolished.—*Wilkerson v. McDougal.* 383
14. *Same; proceedings in, as to declaration, &c.*—In such an action, the tenant in possession, who is the real defendant, on being served with a copy of the declaration and notice, is required, under the consent rule, to confess lease, entry and ouster, and put in his plea of not guilty and insist upon his title only; after this, he can not demur to the declaration. If the declaration is insufficient, it should be set aside and amended.—*S. C.*
15. *Unlawful detainer; when lies.*—A tortious possession of land may become lawful by agreement of the parties, express or implied; and in that case, unlawful detainer will lie to recover the possession, upon demand in writing, after the termination of such lawful possessory interest.—*Bates, Adm'r. v. Ridgeway.* 611
16. *Trover, action of; by mortgagee against mortgagor, when will lie.*—Trover will lie in favor of the mortgagee against the mortgagor and his consignee, notwithstanding the mortgage stipulated that on or be-

ACTION—CONTINUED.

- fore the law day the goods were to be shipped by the mortgagor, who retained possession, to a factor of his own selection, who was to sell them for the benefit of the mortgagee, if they appropriate them to their own use, by sale or otherwise, before or after the law day.—*Jones, Adm'r, v. Webster*..... 109
17. *Partner; how may be sued to enforce firm liability.*—A judgment against a partnership in its firm name alone, will support an action against an individual member of the firm to enforce his individual liability for the firm debts.—*Cox v. Harris*..... 538
18. *Action against partner; how may be revived.*—An action may be brought against one member of a partnership firm, on a contract made by the firm. In such an action, on the death of the defendant, the same survives against the personal representative of the deceased, and may be revived in the name of such representative as defendant.—*Ex parte Ware*..... 223
19. *Actions commenced by non-residents; when should be dismissed.*—All actions commenced by or for the use of non-residents of this State, in the courts of the State, should be dismissed on motion unless security for costs be given previous to the issuance of the summons.—*Stillman, Marvin, Hall & Co. v. Dunklin & Co.*..... 175
20. *Same; no limit to right to move to dismiss.*—There is no limitation of time confining this motion to a particular term of the court in which the suit is pending. It may be made at any time before the trial, if the right is not waived.—*S. C.*
21. *Trustee of express trust, action by; when does not abate, and how may be received.*—Where the trustee of an express trust commences an action on a promissory note belonging to the trust estate, and resigns, the action is not thereby abated, but may be revived in the name of his successor, and if, after an order is made reviving the suit in the name of such successor, the court, on defendant's motion, strikes the case from the docket, and renders a judgment against the plaintiff for the costs, on appeal the judgment will be reversed, and the cause remanded for further proceedings, &c.—*Dumas v. Robins*..... 545
22. *Action against railroad company; what need not be alleged.*—In an action of damages against a railroad company, by an administrator, for injuries causing the death of his intestate, it is not necessary to aver that the intestate left a widow, child, or next of kin.—*Ala. & Fla. R. R. Co. v. Waller*..... 462
23. *Revenue law of 1868; section 93 of; unconstitutionality of.*—Section 93 of the revenue law of 1868, which requires the owner of land sold for taxes to deposit double the amount of the purchase-money, &c., before he shall be allowed to prosecute or defend any suit for the same against the purchaser, is unconstitutional.—*Stoudenmire v. Brown*..... 699

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ADVANCES.

See ATTACHMENT, 1, 2.

AGENT.

See PRINCIPAL AND AGENT.

AMENDMENT.

1. *Action against executrix; what amendment permissible.*—Where the action is against an executrix, and the complaint is on a note made by her, as executrix, to which a demurrer is filed, because it does not show any cause of action against her, as executrix, the complaint may be amended by adding counts, stating an indebtedness by testator, in his life-time, and striking out the count on the note described in the original complaint.—*Taylor, Ex'r. v. Perry*. 240
2. *Amended complaint; objection to filing of, when properly overruled.*—An objection to a motion for leave to file an amended count to the complaint, that states no reason for the objection, may be overruled without error.—*Reynolds v. Dismukes*. 209
3. *Amendment; petition; when should not be dismissed for irregularities, &c.*—When a petitioner, under § 2961 Revised Code, is a female and a minor, her petition should not be dismissed for any irregularity or informality, which would be amendable. The court should direct the petition to be properly amended, if it was deemed insufficient. Its dismissal is to be looked upon with grave disfavor, in such a case.—*Hudson v. Stewart*. 204

See CHANCERY,

Title, PRACTICE AND PLEADING.

APPEAL.

See ERROR AND APPEAL.

APPRENTICE.

1. *Indenture of apprenticeship made by probate judge under section 1450 of Revised Code; how regarded.*—An indenture of apprenticeship, made by a probate judge, under section 1450 Revised Code, is to be regarded as a deed, and when offered as evidence its execution must be proved as other deeds.—*Owen v. State*. 328
2. *Same; jurisdiction of probate judge, what sufficient to show.*—The jurisdiction of a probate judge in any particular case sufficiently appears, if it be stated in the indenture of apprenticeship itself, that the parents of the child thereby bound out are unable to provide for its support.—*S. C.*
3. *Variance; what is not.*—On the trial of an indictment, under sec-

APPRENTICE—CONTINUED.

tion 3690 Revised Code, for enticing, decoying or persuading an apprentice to leave the service or employment of his master, if an indenture of apprenticeship is offered by the State, to prove that the person charged to have been enticed, &c., was an apprentice, and the name in the indictment is George Blair, and in the indenture he is called a certain boy, named George, this is not a variance, but a defective description that may be aided by parol proof.—*S. C.* 328

ASSIGNMENT.

See DEBTOR AND CREDITOR.

ATTACHMENT.

1. *Lien for advances; when may be enforced by attachment.*—A lien, created by contract, on the crop and stock of another for “advances” to assist in making the crop, is such a lien as may be enforced by attachment, as in case of attachment for rent.—*Rev. Code, §§ 1860, 1858, 2961.—McKinney, Surv. Part. v. Benagh.* 358
2. *Same; when attachment not dissolved by death of defendant.*—In such a case, the attachment is but process to enforce the lien; and on the death of the defendant in such an attachment suit and the insolvency of his estate, the lien thus existing is not dissolved, as to the property attached subject to the contract lien. The court should enforce such lien by ordering the sale of such property, at the same time judgment is rendered for the debt or demand secured by the lien.—*S. C.*
3. *Attachment bond, &c.; how may be proved.*—While, in a suit on an attachment bond the plaintiff may offer the original bond in evidence, he need not do so, otherwise than by introducing the final record of the attachment suit. The defendant, if he executed the bond, is precluded from disputing its existence or genuineness by the record.—*Adams v. Olive et al.* 551

ATTORNEY.

1. *Attorney's lien; to what does not entitle attorney.*—The attorney's right of lien, when he has such lien, on a promissory note in his hands for collection, gives him no right to a judgment (in a suit between the client and the defendant) against the defendant for the amount of his fees, after the debt has been paid by the defendant to the plaintiff, either in the name of his client or in his own name, even if the plaintiff be insolvent.—*Tillman v. Reynolds* 365
2. *Agreement of counsel to change venue; effect of.*—An agreement between the attorneys for the defendant and the counsel for the prosecution, that the trial of a criminal may be returned to the county from which it was removed, presents no legal reason for demanding such return, and an application for *mandamus* to compel the court

ATTORNEY—CONTINUED.

in which the indictment is pending to return the trial of the cause to the court from which it was removed, will be denied.—*Ex parte Dennis* 304

BAIL.

1. *Bail bond; what sufficient proof of execution of.*—On the rendition of judgment final against obligors on a forfeited bail bond, taken and approved by a justice of the peace, for the appearance of the principal at the circuit court, *scire facias* having duly issued to them to appear and show cause why judgment final should not be rendered, no further proof of the execution of the bail bond is required, where it is in proper form, than the bond itself, properly signed by the justice who took and approved it.—*Gresham et al. v. State*..... 625
2. *Same; execution of, how denied.*—On appeal in such a case to the supreme court, the obligors can not object that no sufficient proof was made in the court below of the execution of the bond. If the obligors did not execute the bond, they should have set it up as matter of defense by proper plea in the court below.—*S. C.*
3. *Same; judgment nisi; what should state.*—A judgment *nisi* on a forfeited undertaking of bail should state the offense for which the accused was indicted.—*S. C.*
4. *Sci. fa.; what should state.*—A *sci. fa.* on such a judgment should set out the judgment, or recite it substantially.—*S. C.*
5. *Indictment for murder; will sustain forfeiture of appearance to answer for manslaughter.*—An indictment for murder of a certain person will sustain a judgment of forfeiture on a bail bond requiring the accused to answer a charge of manslaughter of the same person.—*S. C.*

BAILMENT.

See COMMON CARRIER.

BANK.

1. *Bank, violation of charter by circulating notes not payable on demand; what contract does not vitiate.*—The violation of its charter by an incorporated bank, in circulating as currency notes or bills not payable on demand, does not vitiate a contract made by the bank with other parties involving the circulation of such notes or bills.—*Common v. McNab and Eastern Bank*..... 99

BANKRUPTCY.

1. *Bankruptcy of party after appeal to supreme court; when not sufficient ground to set aside judgment.*—If a party becomes bankrupt after the submission of a cause in the supreme court, the judgment will not be set aside, but will be rendered as of the date of the submission.—*Booker v. Adkins*..... 529

BANKRUPTCY—CONTINUED.

2. *Same; what not sufficient evidence of bankruptcy, &c.*—A mere suggestion, on information and belief, by the appellant, that the appellee has become bankrupt since the appeal, but before judgment rendered in this court affirming the judgment of the court below, will not authorize any action by the supreme court.—*S. C.*..... 529

BILL OF EXCEPTIONS.

1. *Bill of exceptions; when judge not bound to sign.*—A judge is not bound to sign a bill of exceptions reserved and tendered in the court below, unless it contains "the point, charge, opinion, or decision, wherein the court is supposed to err, with such a statement of the facts as is necessary to make it intelligible."—Rev. Code, § 2755.
2. *Same; what bill too imperfect to be established.*—A bill of exceptions is imperfect and insufficient if it merely refers to a charge without inserting it. The direction, "*here insert it,*" or "*here set out the charge,*" does not make the charge or other document thus referred to a part of it. And such an imperfect bill of exceptions can not be established in this court, in the manner prescribed by the Code.—Rev. Code, § 2758.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory note; what is void.*—A note, the consideration of which is the compromise of a note given for the loan of Confederate treasury-notes, is void as against the public policy of the State and of the United States.—*Wilson v. Bozeman*..... 71
2. *Promissory note; when without consideration.*—A promissory note given for the debt of another, on the assurance of the payee that the agent of the debtor will pay it on request, but without the knowledge or assent of such debtor or his agent, is without consideration, notwithstanding the note is made payable sometime after the transaction, and the claim against the debtor is receipted and delivered to the maker.—*Stoudenmire v. Ware*..... 589
3. *Negotiable note, given in part for Confederate money; void as to immediate parties to note.*—A negotiable promissory note, the consideration of which is partly a loan of Confederate treasury-notes and partly a sale of goods, is void as between the immediate parties to it, but it is valid in the hands of an innocent indorsee, who is a *bona fide* holder for valuable consideration, without notice of the illegality, unless it be made wholly void by statute in the hands of such indorsee.—*Bozeman v. Allen*..... 512
4. *Same; as to when illegal consideration will not avoid contract.*—To a negotiable promissory note in the hands of an indorsee who is a *bona fide* holder for valuable consideration, without knowledge of the illegality, this rule of law does not apply. Such indorsee may recover on such note, notwithstanding the illegality, (3 Kent, 79, 80,) unless some statute declares the contract a nullity *ab initio*.—*Bozeman v. Allen*..... 513

BILLS OF EXCHANGE, &c—CONTINUED.

5. *Promissory note given by executor, for debt of testator; effect of.*—A promissory note given by an executor or administrator, for a debt of the testator or intestate, is neither a payment nor an extinguishment of a promissory note made by testator. At most, it only suspends the right of action on the original debt, until the maturity of such note. The transfer of such a note by delivery, operates to pass to the holder the real interest in the original debt, and under § 2523, Revised Code, authorizes and requires him to sue for its recovery in his own name.—*Taylor, Ex'r, v. Perry*..... 240
6. *New note, payment of interest on.*—Payments of interest on such a note, are, in legal effect, partial payments upon the original debt, and preserve it from the influence of the statute of limitations.—*S. C.*
7. *Promissory note; when executor should not be charged with note not collected by him.*—An executor should not be charged with the amount of promissory notes payable to his testator, because they remain in his hands uncollected, when it is shown that the maker claimed a larger amount against the estate on a contract with the testator for work to be done, which was done, and that an attorney, whom the will requested should be consulted on such matters, advised against suing on the notes.—*Bowen v. Montgomery*..... 353
8. *Promissory note payable to township trustees; how collected before adoption and inauguration of present educational system.*—Promissory notes payable to township trustees, or their successors in office, under the free public school system, for money loaned by them, that had accrued from the sale of the sixteenth section of their respective townships, might, before the inauguration of the present educational system, have been collected by said trustees, in their name as trustees, &c., for the use of schools and school purposes in said townships.—*Yerby, Sup't, v. Sexton*..... 311
9. *Same; who may sue to collect under present educational system and laws.*—Under the present educational system, such notes are required to be turned over to the county superintendent of education of the proper county, and, if necessary, may be collected by suit in his name as county superintendent, &c.—*S. C.*
10. *Promissory note; when married woman may bind separate statutory estate by making.*—A married woman, a citizen of this State, who is the owner of a statutory separate estate, is clothed by law with the power to collect her debts, by suit or otherwise, and to "receive," with the concurrence of her husband, any property to which she may become entitled after her marriage. And in dividing the proceeds of a promissory note, in which her interest is one-fourth part, and the note is paid by a transfer of land, and the land is valued at more than her share, if she takes the land, she may pay the balance above her share in money or bind herself by her own and her husband's promissory note for this balance.—*Becton v. Selleck*..... 226
11. *Promissory note for land; transfer of, when carries lien with it.*—Where land is appropriated to the payment of a debt, by authority given to

BILLS OF EXCHANGE, &c.—CONTINUED.

- the creditor to sell it for that purpose, the note of the vendee, payable to such creditor, in pursuance of the agreement, carries with it the vendor's lien.—*Roper v. Day*. 509
12. *Same*.—If a vendee who has not paid the purchase-money, sell the land, requiring his purchaser to satisfy such outstanding liability, and it is done by the substitution of the purchaser's note, the vendor's lien accompanies the note as a transfer of the right to receive the purchase-money, to the exclusion of a balance due to such vendee; especially when the original creditor only consents to the arrangement on that condition.—*S. C.*
13. *Same; who entitled to enforce vendor's lien*.—If one, to whom the original creditor has assigned the note of the last purchaser, buys the land from him in consideration of it, the vendor of the purchaser may, by paying the note, have a decree for the sale of the land in satisfaction of a balance due him.—*S. C.*

BONDS.

I. INDEMNIFYING.

1. *Indemnifying bond, sureties on; how may be sued, and for what liable*.—The sheriff having an attachment against the estate of McD., levied on the goods of W., and afterwards levied executions on judgments in the attachment suits against McD. on the same property, but refused to sell unless indemnified; whereupon, the plaintiff in attachment, with sureties, entered into an indemnifying bond conditioned "to hold the sheriff harmless from all liability and damage in consequence of the levy,"—*Held*, that the obligors on such bond are liable in an action of trespass to the owner of the property, (where it was sold,) for the value of the property at the time of its seizure under attachment, with interest thereon to the time of the trial.—*Screen v. Watson*. 629
2. *Indemnifying bonds; when not void; when chancery will entertain jurisdiction to compel obligors on, to contribute pro rata, &c.*—O., as the sheriff of the county of Greene, having numerous executions on judgments at law against F., was induced by the parties interested in said executions to levy the same on property belonging to Mrs. F., wife of F., as her separate estate at common law, which property was sold by the sheriff under said levies, and the proceeds applied to the satisfaction of said judgments against the husband; but before the levy and sale, and in order to induce the sheriff to seize and sell said property of the wife, the parties interested in said judgments executed to the sheriff sundry bonds, for the purpose of indemnifying him against liability to Mrs. F. for making such levy and sale, in the event that the property thus seized turned out to be her property, and not subject to said executions, thus in the hands of said sheriff,—*Held*, that the bonds thus executed were not void, whether they were made as statutory bonds to indemnify the sheriff, or bonds

BONDS—CONTINUED.

at common law, if there was doubt as to the title of the property, proposed thus to be levied on, which rendered it liable to satisfy said executions, and that Mrs. F. and her husband might file her bill in chancery to compel the obligors to said bonds to contribute *pro rata* in proportion to the amounts of the several penalties of said bonds, to the payment of her decree against said sheriff for the improper seizure and sale of her separate property under said executions, thus induced to be made by them through the agency of said sheriff, her decree being that of a rebel court, on which it is doubtful whether any process of garnishment can be issued to aid in its collection.—*Kirksey et al. v. Friend*..... 276

3. *Indemnifying bonds in present case; when condition of was broken.*—The condition of said bonds was broken as soon as there was a liability fixed against the sheriff in favor of Mrs. F. by decree in her favor, which the obligors in said bonds refused to pay.—*S. C.*

II. SHERIFF'S.

4. *Approval of bond of sheriff; imposes ministerial duty on probate judge.* The duty of the judges of probate in this State to approve of the official bonds of sheriffs, is a ministerial, and not a judicial duty.—*Ex parte Candee*..... 386
5. *Same; when mandamus will be allowed to compel approval of.*—A writ of *mandamus* is the appropriate remedy to compel judges of probate to approve of such bonds, if made in the form, and for the proper amount, and payable and conditioned as required by law, with sufficient sureties, and presented for approval within fifteen days after the election.—*S. C.*
6. *Bond; failure to give does not vacate office.*—The office of a sheriff is not vacated by his failure to file his official bond in the office of the judge of probate of his county, within fifteen days after his election. Such failure may be a cause of forfeiture and vacancy, which may be taken advantage of and enforced by the State, in a proper judicial proceeding for that purpose.—*S. C.*

III. MUNICIPAL.

7. *Bonds; time when tax to be levied for payment of; when directory merely.*—A statute prescribing a period of time within which public officers are to perform official acts regarding the rights of others, will, as to third persons, be held to be *directory* merely, and not to invalidate or prevent official acts after the expiration of the specified time, unless the nature of the act to be performed, or the spirit of the statute, force a contrary conclusion; hence, where a statute (under which a county issued bonds, a series of which fell due annually for a period of ten years,) provided that “as soon as” certain prescribed conditions were complied with, “and annually thereafter, for a period of ten years,” the court of county commissioners should levy and assess a tax sufficient to pay the series falling due each year, it was held, that the failure to assess and collect the tax within the time pre-

BONDS—CONTINUED.

- scribed, did not thereafter limit or destroy the power to levy and collect the tax, but that the power existed as long as the legal obligation to pay the debt subsisted.—*Comm'r's Court v. Rather*. 434
8. *Bonds issued by county of Limestone under act of December 14, 1855; create valid obligations against the county, the payment of which will be enforced by mandamus*.—The bonds issued by the court of county commissioners of Limestone county, under the act entitled "An act to authorize the commissioners court of Limestone county, State of Alabama, to subscribe to the capital stock of the Tennessee and Alabama Central Railroad Company," passed over the veto of the governor on the 14th December, 1855, create a valid debt against the county, which are not required to be presented for allowance to the commissioners court; and the commissioners court, refusing to levy and assess a tax, as authorized by law, to pay the bonds, were compelled to do so by *mandamus*, which was held to be the appropriate remedy to enforce the payment of the bonds.—*S. C.* 435

CHANCERY.

I. JURISDICTION.

1. *Account; when will be decreed*.—Mrs. B., a widow in feeble health, with a family to provide for, in extreme and distressing poverty, earned \$446 in the year 1867 as a teacher in a public school in this State, for which she filed her account in a proper manner with the superintendent of the public schools of the proper county, but the payment of the claim thus filed was postponed and not made until April, 1870. Before it was paid, B., an influential and well informed merchant of the county, came to see her for the purpose of buying her claim. He represented to her that all the other teachers of the schools were selling their claims at fifty cents in the dollar; that the money to pay her claim had not been received by the superintendent, and might not be received in some months. Confiding in the truth of these representations, she sold her claim for fifty cents in the dollar, and received her pay. Shortly afterwards, she learned that B.'s representations were all false, and that he had deceived and cheated her, and that the money to pay her had been received and that B. had opportunities to know it. She went to him and proposed to cancel the trade for her claim and tendered him back the money he had paid, but he refused to do this, and collected her claim and applied the funds to his own use.—*Held*, chancery had jurisdiction, and would compel B., the merchant, to account to the widow for the proceeds of her claim so gotten possession of by him.—*Balkum v. Breare*. 75
2. *Bill for discovery; when not without equity*.—A bill in chancery for a discovery and account of property disposed of under such a contract, as in the case at bar, is not without equity.—*Cannon v. McNab and Eastern Bank*. 99

CHANCERY—CONTINUED.

3. *Same; what jurisdiction not defeated by.*—The change of the law of evidence which allows the parties to a suit to be examined as witnesses, does not take away the jurisdiction of chancery to compel a discovery.—*S. C.*
4. *Creditor's bill under section 3442 of Revised Code; when without equity.*—A bill filed under the provisions of section 3442 of the Revised Code, by a judgment creditor whose execution is not satisfied, to subject to its payment property held in trust for his debtor, is wanting in equity unless it alleges a return of "no property," or a partial satisfaction only.—*Mixon v. Durdin*..... 455
5. *Chancery; collection of, what decree of, will be enforced in present State courts.*—Mrs. F. and her husband, on the 17th day of June, 1861, obtained a decree in a chancery court, held under the rebel authority, in the county of Greene, in this State, for the use of Mrs. F., as her separate estate, under the will of her father, made in 1838, against O., sheriff, for an improper levy and sale of her property, for \$5,227 48. On this decree execution was issued, and returned "no property found" against O., who was insolvent,—*Held*, that a court of chancery will entertain jurisdiction to enforce the collection of said decree, in the name of the husband and wife in a proper case, as for her separate estate at common law, when the marriage was before our statute upon the separate estate of wife.—*Kirksey et al. v. Friend*..... 276
6. *When chancery will entertain jurisdiction to compel obligors on indemnifying bonds to contribute pro rata, &c.*—O., as the sheriff of said county of Greene, having numerous executions on judgments at law against F., was induced by the parties interested in said executions to levy the same on property belonging to Mrs. F., wife of F., as her separate estate at common law, which property was sold by the sheriff under said levies, and the proceeds applied to the satisfaction of said judgments against the husband; but before the levy and sale, and in order to induce the sheriff to seize and sell said property of the wife, the parties interested in said judgments executed to the sheriff sundry bonds, for the purpose of indemnifying him against liability to Mrs. F. for making such levy and sale, in the event that the property thus seized turned out to be her property, and not subject to said executions, thus in the hands of said sheriff,—*Held*, that the bonds thus executed were not void, whether they were made as statutory bonds to indemnify the sheriff, or bonds at common law, if there was doubt as to the title of the property proposed thus to be levied on, which rendered it liable to satisfy said executions, and that Mrs. F. and her husband might file her bill in chancery to compel the obligors to said bonds to contribute *pro rata*, in proportion to the amounts of the several penalties of said bonds, to the payment of her decree against said sheriff for the improper seizure and sale of her separate property under said executions, thus induced to be made by them through the agency of said sheriff, her decree being

CHANCERY—CONTINUED.

- that of a rebel court, on which it is doubtful whether any process of garnishment can be issued to aid in its collection.—*S. C.*
7. *Deed; when will be reformed, &c.*—A father, after the death of his son leaving a widow and minor children, conveyed by deed to his son's administrator land which he had occupied several years under a parol gift, intending to subject it to the claims of his creditors and his wife's dower, in the same manner as if the conveyance had been made before his death,—*Held*, that on a proper bill by the widow, equity will reform the deed, allot the dower, and apportion to the family the statutory provision of five hundred dollars' worth of the land.—*Johnson v. Crutcher*. 368
8. *Settlement in Confederate court, when will not be set aside.*—On the marriage of a female minor, the husband and guardian may make final settlement of the guardianship of her estate in the probate court of the proper county, and if the settlement thus made is correct, and without fraud or mistake, it will not be set aside in chancery, though the settlement was made in a rebel court of probate, and after such accounting and settlement in a rebel court, the guardian may pay over to the wife and husband the balance found to be remaining in his hands on such settlement, and take the receipt of the wife and husband for the same, and such receipt will protect him against a second accounting on a bill filed by the wife against him and her husband, in chancery.—Revised Code, §§ 2422, 2685.—*Wise v. Norton*. 214
9. *Sale of land under execution; when will be enjoined at instance of mortgagee.*—Equity will enjoin a sale of land under a judgment and execution to which it is not subject, at the suit of a mortgagee or trustee in a deed of trust.—*Whitfield et al. v. Clark et al.*. 555
10. *Election, holding of; when will not be enjoined on bill filed by individual electors.*—The holding of an election will not be enjoined, upon the allegation that the act under which it is to be held is unconstitutional, on a bill filed by individual electors in their own names, they not showing any injury or damage to themselves in person, property or rights.—*Jones v. Black*. 540
11. *Chancery; what has not jurisdiction of.*—The land held as the separate estate of the wife under the Revised Code can not be sold under a decree on bill in equity for the payment of a promissory note given by the wife and her husband jointly, made by them since 1852, whether the debt so made is her debt or the debt of her husband, unless, perhaps, it was for "articles for the support and comfort of the household," under section 2376 of the Revised Code.—*Bowen v. Blount*. 670
12. *Same.*—A bill filed against the purchaser of land, who is a resident and freeholder of another county of the State than that in which the lands lie, and where the bill is filed, and against a mere tenant residing on the land, will be dismissed without prejudice. In such a case, the bill should be filed in the chancery court of the district in which the purchaser resides.—*Milner v. Ramsey*. . . 287

CHANCERY—CONTINUED.

13. *Bill in chancery to enforce agreement, &c. ; what will be dismissed.*—D., in his life-time, bought land of S., and died leaving part of the purchase-money due and evidenced by promissory note ; S. made title to D., but retained a vendor's lien with his note. After D.'s death, F. was appointed his administrator, and as such he obtained an order of court to sell the land. S. then proposed to set up his lien and give notice of it to the purchaser under the sale by F. But F., fearing that this would injure his sale under the order of court, agreed in writing with S., that if S. would abandon his lien and allow the land to be sold free of the lien, then F. would appropriate so much of the purchase-money derived from the sale under the order of court, as might be necessary, for the payment of S.'s note for the purchase-money due him from D.'s estate. S. accepted this agreement of F. as the administrator of D., and abandoned his lien on the land, and they both joined in written agreement to that effect. The land was sold free of the lien, under the order of court, by F. as the administrator of D., for a much larger amount than S.'s note ; but after the sale, F. refused and failed to comply with his agreement with S.,—*Held*, 1st, that on a bill by S. against F. as the administrator of D., to compel an appropriation of a portion of said purchase-money in F.'s hands for the payment of S.'s note, the suit could not be entertained against F. in his representative character ; as F. could not, in this way, bind the estate of D. by such an agreement with S. ; and after the lien was abandoned, no bill could be filed to enforce it ; 2d, that such an agreement between F. and S. is the personal contract of F., and not his contract as administrator of D., and can not bind the estate ; 3d, that on the breach of such an agreement, F. may be sued at law, where the remedy is without uncertainty or embarrassment.—*Humes' Adm'r v. Fariss*..... 615
14. *Chancery ; when may order foreclosure of mortgage made by husband and wife on statutory separate estate of wife.*—See *Becton v. Sellick et al.* 226
15. *Chancery ; power to order cancellation, &c.*—In this case the supreme court affirmed a decree, ordering a note made by husband and wife for a loan of money, secured by mortgage on what was held to be the wife's separate statutory estate, to be given up for cancellation, &c., and setting aside and cancelling a sale and conveyance of the mortgaged premises under the power of sale, and decreeing an account against purchaser at such sale for rents, &c., and restoring possession of mortgaged property sold.—*Denechaud et al. v. Berry*..... 591
16. *Bill quia timet ; when without equity.*—A bill *quia timet*, or for performance of a contract of sale of lands by an administrator with the will annexed under a power given by the will, should not be entertained when the allegations of the bill show that the title of the complainant is either good and sufficient at law or wholly void. In either aspect, there is a well known and adequate remedy at law.—*Camp v. Elston*..... 82
17. *Same ; cross-bill.*—A cross-bill filed in such a case should not be

CHANCERY—CONTINUED.

retained, after the dismissal of the original bill, merely as a means of enforcing the collection of rents, as there is also in such case an adequate remedy at law.—Rev. Code, § 2607.—*S. C.* 82

See, also, VENDOR AND PURCHASER.

II. PLEADING AND PRACTICE.

1. *Parties*.—Where, in equity, the complainants charged that, as heirs of their father, they were entitled to certain property left by him at his death, and to other property ascertained to be his by a decree of the probate court, after his death, on the final settlement and distribution of his father's estate, which his administrator, who was also the acting administrator of the other estate, retained by direction of the court, and sought to recover the same from the sureties of the administrators of both estates, who were alleged to have died insolvent,—*Held*, 1st. That the sureties of the administrators of the grand-father's estate were improperly made defendants, because no liability was shown against them,—*Leygett v. Bennett*..... 380
2. That an amendment of the bill, showing that the administrator of the administrator of the father's estate had received all of the assets with which his intestate was chargeable, and had settled his accounts in the probate court, where a decree for the balance unadministered was rendered against him, without an averment of some other reason why the complainants still had recourse against the sureties of the administrator of the father's estate, destroyed the case against the said sureties.—*S. C.*
3. Amendments which would divest a bill of all of its original defendants, and make a new case against new defendants, can not be allowed.—*S. C.*
4. *Bill to foreclose mortgage; who material defendant*.—A purchaser from a mortgagor of mortgaged premises, who has himself mortgaged them to his creditor, is a material defendant to a bill of foreclosure filed by the first mortgagee, notwithstanding his mortgagee has sold the property and become the purchaser, if he retains his equity of redemption.—*Meritt et al. v. Phenix*..... 87
5. *Same; mesne purchasers not necessary parties*.—To foreclose a mortgage, it is not necessary that mesne purchasers who have no interest should be brought before the court.—*S. C.*
6. *Material defendant, who is not; where bill must be filed to enforce lien on land*.—Where a bill is filed to set up and enforce the vendor's lien on lands for the payment of the purchase money, a mere tenant or agent in possession of the land, claiming and having no title or interest in the land, and not charged with any fraud, is not a material defendant.—*Milner v. Ramsey*..... 287
7. *Creditor bill; what facts do not dispense with necessity of averment of return of "no property" on execution*.—The fact that the judgment creditor was prevented from having execution at law upon his judg-

CHANCERY—CONTINUED.

- ment, by certain military orders issued by the officer in command in this State, under the acts of congress commonly known as the reconstruction acts, does not dispense with the necessity for a return of "no property," so as to entitle the creditor to maintain a bill under § 3442.—*Micon v. Dunklin*. 455
8. *General relief; prayer for, what decree authorizes.*—Under the general prayer for relief, of a bill in equity, when in the disjunctive, the complainant may receive the relief to which his case entitles him, different from his special prayer, if the defendant will not thereby be surprised.—*Graham v. Cook*. 103
9. *Hire of boat; when damages by way of, may be properly decreed.*—Where one part owner of a steamboat sold the entire interest to persons chargeable with notice of the rights of the other owner, which they and their vendor deny and repudiate, on a bill filed against them by said owner praying to have her interest established, and an account of the earnings, the defendants can not complain if her proportion of the reasonable hire of the boat during its detention be decreed to the complainant as damages.—*Graham v. Cook*. 103
10. *Injunction; notice of motion to dissolve, what insufficient.*—Notice to complainants that application will be made to the chancellor in vacation to dissolve an injunction "at Lafayette, in Chambers county, Alabama, or at such place as said chancellor may be required to be by law," is void for uncertainty.—*Florence v. Paschal*. 458
11. *Injunction; when dissolved on unsworn answer.*—In an injunction bill, if the complainants waive the answers of the defendants being "made on oath," this does not impair the right of the defendants to have the injunction dissolved upon the denials of such unsworn answers, in like manner as if they were sworn.—*Lockhart et al. v. The City of Troy*. 578
12. *Decree of chancellor; when will not be disturbed.*—When the chancellor's decree is not repugnant to the preponderance of the evidence, it will not be disturbed.—*Harkins v. Bailey*. 370
13. *Costs; when should be divided.*—Where a bill *quia timet*, by a complainant whose title was either good at law or wholly void, was dismissed for that reason, and when a cross bill for collection of rents, &c., had been filed, it was held that it should also be dismissed, and that the costs should be equally divided.—*Camp v. Elston*. 82

CHARGE OF COURT.

1. *When may be refused.*—A charge that is inapplicable to the issue, and calculated to mislead the jury, should be refused. So, too, a charge that assumes the truth of the evidence, and withdraws from the jury the considerations of its credibility, ought to be refused.—*Taylor v. State*. 157
2. *What presumptions will be indulged in to uphold.*—The charges of the court must be confined to the issues and the evidence before the jury on the trial; and where the record fails to show what the issues were,

CHARGE OF COURT—CONTINUED.

- and all the testimony is set out in the bill of exceptions, this court will not presume that there was not an issue to which the charges were applicable, if the evidence tends to support the charges, when the appellant comes here to set aside a non-suit taken in the court below.—*Hill v. Smith*. 562
3. *What erroneous*.—A charge that requires the court to determine what the evidence proves, should be refused. Admitting the evidence to be true, it is the province of the jury, and not of the court, to find or determine what it proves.—*Mara v. Bell, Moore & Co.* . . . 498
4. *Same*.—A charge which assumes the truth of evidence, and withdraws the consideration of its credibility from the jury and instructs them that they must find for the defendant, is an invasion of the province of the jury, and necessarily erroneous.—*David v. Malone*. 428
5. *What abstract*.—Where there is evidence showing that a homicide was perpetrated, under circumstances which did not compel the slayer to take life to save his own life or limb from peril, and which also show that the slayer had no reasonable cause to believe in the existence of any necessity to take life, charges as to the law of self-defense are abstract, and may be properly refused.—*Taylor v. State*. . . 180
6. *Charge ignoring plea of self-defence*.—On the trial of a defendant charged with murder in the first degree, where the evidence shows that the accused was not forced to take the life of the deceased in order to save his own life or limb from serious peril, and had no reasonable cause to entertain a belief of such necessity to take life, a charge of court which ignores the excuse of self-defense is not erroneous.—*S. C.*
7. *Charge as to mode of impeaching witness; mode of impeaching; what erroneous*.—Where a witness is impeached, either by calling witnesses to depose to his general bad character, or by contradicting him, as to some statement alleged to have been made by him out of court, which he denies on his examination in court,—it is an error in the court to charge the jury to *throw aside* the testimony of such witness, and not to consider it, except in so far as it may be sustained or corroborated by other testimony in the cause.—*Addison v. State*. 478
8. *As to intent with which act was done; what should be refused*.—On the trial of indictment for betting at keno, the following charge, asked by the defendant, should be refused, to-wit: "If defendant, if he did bet, had no intention to violate the law of the State, the jury must acquit him."—*Schuster v. State*. 199
9. *Bell-rope; neglect to reach through passenger car*.—A charge in an action against a railroad company by a passenger to recover damages for injuries alleged to have occurred through its negligence, &c., that the defendant would be liable if the bell-rope did not reach through the passenger car, at the end of a train, is erroneous; the neglect must appear to have caused or contributed to the injury.—*Mobile & Montgomery Railroad Co. v. Ashcraft*. 16

CHARGE OF COURT—CONTINUED.

10. *Qualification of written charge; when not error.*—A judgment will not be reversed, because a charge in writing, asked to be given, is given with a qualification, if the charge itself might have been refused without error. Such qualification, if it be an error at all, is an error without injury.—*Sawyer & Boulet v. Lorillard*..... 333

CODE OF ALABAMA.

See REVISED CODE OF ALABAMA.

CHARTER.

1. *Subject of act to incorporate town or city; what sufficient expression of in title.*—The subject of a law to incorporate a city or town is the *charter of incorporation*. This subject is sufficiently expressed in the title, by the words, "An act to establish a charter for the city of Troy, in Pike county." The title need not set out an enumeration of all the powers intended to be conferred on the corporate authority.—*Lockhart v. City of Troy*..... 581
2. *Bank, violation of charter by circulating notes not payable on demand; what contract does not vitiate.*—The violation of its charter by an incorporated bank, in circulating as currency notes or bills not payable on demand, does not vitiate a contract made by the bank with other parties involving the circulation of such notes or bills.—*Cannon v. McNab and Eastern Bank*..... 99
3. *Power of general assembly to confer exclusive privileges; test of.*—The test of the power of the legislature to confer franchises on particular individuals is, whether the privilege conduces to the public good, and is such as must be committed to a few in order to be available.—*Horst, Mayor, v. Moses*..... 129
4. *Dissolution of corporation; effect of, on its right to sue.*—The dissolution of a corporation in this State does not effect its right to sue and be sued, until the lapse of five years after such dissolution.—Revised Code, § 1775.—*Tusk. Sci. & Art Association v. Green*..... 346
5. *Tuskaloosa Scientific and Art Association; charter of, creates a contract which the State can not impair by repeal of charter.*—The charter incorporating the Tuskaloosa Scientific and Art Association, made it a body corporate to continue of force for 25 years from the date of the act incorporating it, and constituted a contract between the State and the corporation, which it is beyond the power of the general assembly to repeal or impair by subsequent legislation. The act of the general assembly of Alabama approved March 9th, 1871, repealing the charter, is unconstitutional and void. (*Per PETERS, J., the court expressing no opinion on this point.*)—*S. C.*..... 346
6. *Marion, town of; power of under charter to license retail liquor dealer.*—The town of Marion, in Perry county in this State, is authorized by its act of incorporation and its by-laws to require a person propos-

CHARTER—CONTINUED.

ing to sell spirituous liquors by retail in the limits of said town, to purchase a license from the corporate authorities for the same, although he has obtained a State and county license; and moneys paid for such license, although paid under protest, can not be recovered back, in an action of debt or assumpsit against said corporation.—*Welch v. Mayor, &c., of Marion*. 291

7. *Act to establish Mobile Charitable Association; unconstitutionality of.*—The act to establish the Mobile Charitable Association, &c., approved December 31st, 1868, is repugnant to article IV, section 2, of the State constitution, for variance between the subject of the act and that expressed in its title. It is also violative of article I, section 32, of the State constitution, because it confers an exclusive privilege on the partnership.—(PETERS, J., dissenting.)—*Horst, Mayor, v. Moses*. . . 129

CITATION.

1. *Citation; when void for uncertainty.*—A citation to the executor of a deceased defendant, with a view to revive the suit against him, as follows: "The State of Alabama, Dallas county. To any sheriff of the State of Alabama, greeting: You are hereby commanded to summon J. Cooper Wadddill to be and appear at the next term of this court, to be held on the 2d Monday in July, 1869," &c. "Witness my hand, this 29th day of March, 1869. E. M. Gantt, clerk," is void for uncertainty as to the court in which the party must appear. The defect is not remedied by the indorsement, "City Court of Selma, July term, 1869;" nor by the date indicated for the return of the process.—*Waddill, Ex'or, v. John, Guardian*. 233
2. It is not error to revive the suit against the personal representative on the second day of the term to which the citation is returnable.—*S. C.*

COMMON CARRIERS.

1. *Common carriers; what are.*—Under the laws of Alabama, railroad companies are common carriers, and subject to all the liabilities of such carriers. Where suit is brought in this State against a common carrier for failure to deliver freight received for transportation, (under contract made and to be performed wholly in another State,) it will be presumed, in the absence of proof to the contrary, that the common law, as to common carriers, prevailed in the State where such contract was entered into and was to be performed.—*South Western Railroad Company v. Webb*. 585
2. *Same; when not liable for failure to deliver goods, &c.*—In an action against a railroad company for failure to deliver cotton received by it for transportation, &c., it is not liable for cotton stolen or lost after a deposit on a platform at a station-house, unless it be shown that the railroad company or its agents had notice of the deposit and received the cotton for transportation as a common carrier.—*S. C.*

COMMON CARRIERS—CONTINUED.

3. *Same; delivery a question of fact.*—In such an action, it is a question of fact to be determined (under appropriate instructions from the court) by the jury from all the evidence, whether or not there was a delivery to the carrier for transportation.—*S. C.*

CARRIERS OF PASSENGERS.

See RAILROADS.

CONFEDERATE MONEY.

1. *Confederate money; contract based on loan of, void.*—A note, the consideration of which is the compromise of a note given for the loan of Confederate treasury-notes, is void as against the public policy of the State and of the United States.—*Wilson v. Bozeman*..... 71
2. *Contracts involving circulation of Confederate currency; when not void.*—Although a loan of Confederate currency is not a sufficient consideration for a promise to pay money, contracts for the sale and purchase of property, involving its use and circulation are not void.—*Cannon v. McNab and Eastern Bank*..... 99
3. *Negotiable note, given in part for Confederate money; void as to immediate parties to note.*—A negotiable promissory note, the consideration of which is partly a loan of Confederate treasury-notes and partly a sale of goods, is void as to the immediate parties to it, but it is valid in the hands of an innocent indorsee, who is a *bona fide* holder for valuable consideration, without notice of the illegality, unless it be made wholly void by statute in the hands of such indorsee.—*Bozeman v. Allen*..... 512

CONSTITUTIONAL LAW.

1. *Act of legislature; when will not be declared unconstitutional.*—A statute will not be declared unconstitutional on the application of a mere volunteer, or person whose rights it does not specially affect. This will only be done in a proper case where some person seeks to resist the operations of the statute, and calls in the judicial power to pronounce it void as to him, his property or his rights.—*Jones et al. v. Black*..... 540
2. *Journals of two houses of general assembly; courts will take judicial notice of, for purpose of ascertaining whether a law was passed in accordance with constitution.*—The journals of the two houses of the general assembly are public records, of which the courts will take judicial notice, and if it appear from said journals that an act was not passed according to the forms of the constitution, it will be declared not to have the force of law.—*Moody v. State*..... 115
3. *Same; when will not be declared void.*—Where a bill originates in one house of the general assembly, and is there passed and sent to the other house, and is there materially amended, and said amendments

CONSTITUTIONAL LAW—CONTINUED.

- are concurred in by the house in which it originated, but when prepared for the signatures of the presiding officers of the two houses the said amendments are omitted, and it is signed by the presiding officers and approved by the governor without said amendments, such bill does not acquire the force of law, and as an act of the legislature is wholly void.—*S. C.* 115
4. *Act to regulate elections, approved February 26, 1872; unconstitutionality of.*—The act entitled "An act to regulate elections in the State of Alabama," approved the 26th of February, 1872, (as the same is published in the book of Acts of 1871-72, p. 15,) never acquired the force of law as a constitutional enactment of the general assembly of this State. The said act as published was never passed by the two houses of the general assembly, and is therefore without any validity as a law of this State, and imposes no legal obligation on any body.—*S. C.*
 5. *Same.*—The bill, having the same title, which passed the two houses was never signed by the presiding officers of the two houses, and was never submitted to the governor for his approval, and for these reasons never acquired the force of law.—*S. C.*
 6. *Revised Code, §§ 3602 and 3603; unconstitutionality of.*—Sections 3602 and 3603 of the Revised Code, which prohibit the inter-marriage of white persons and negroes, and forbids any person, authorized to solemnize the rites of matrimony, to do so in such cases, when applied to citizens of the United States, or of the State, are in contravention of the act of congress of April 9, 1866, known as the "civil rights bill," and repugnant to section 1 of the 14th amendment to the federal constitution, and to art. I, § 2, of the State constitution.—*Burns v. State.* 196
 7. *Citizenship; what rights confer.*—The promotion to citizenship of persons before excluded, is an admission of them to all the rights and privileges of other citizens in the same manner and to the same extent.—*S. C.*
 8. *Same.*—The persons who acquired citizenship under the 14th amendment, and the State constitution, can not be distinguished by legislation from the former citizens, for any of the causes which previously characterized their want of citizenship.—*S. C.*
 9. *Overruled case.*—*Ellis v. The State*, 42 Ala. 525, overruled as to this point.—*S. C.*
 10. *Act to establish Mobile Charitable Association; unconstitutionality of.*—The act to establish the Mobile Charitable Association, &c., approved December 31st, 1868, is repugnant to article IV, section 2, of the State constitution, for variance between the subject of the act and that expressed in its title. It is also violative of article I, section 32, of the State constitution, because it confers an exclusive privilege on the partnership.—(PETERS, J., dissenting.)—*Horst, Mayor, v. Moses.* 129
 11. *Supplemental act; when not unconstitutional for non-compliance with*

CONSTITUTIONAL LAW—CONTINUED.

- art. 4, section 2, of constitution.*—An act "supplemental" to another act need not set out the act to which it is supplemental, in order to make it conform to the constitution, which requires, in case of the revision or amendment of a former act, that the "new act" shall contain the act "revised or amended."—Const. Ala., Art 4, § 2.—*Lockhart et al. v. The City of Troy*..... 581
12. *Healing act; test of constitutionality of.*—A healing statute is not bad for unconstitutionality, if it gives validity to an act irregularly done, which the legislature could have authorized to be done in the irregular way in the first instance.—*S. C.*
13. *Acts of person disqualified to hold office; valid as acts of de facto officials, until inquisition of office.*—The official acts of a person disqualified to hold office, "by reason of his participation in the late rebellion of the so-called Confederate States against the United States," are not void, when such person holds his office under authority of the rightful government of the State, until after his right to the office is determined against him in some legal way.—*S. C.*
14. *Contracts; law as to enforcement of remedy, how can not be changed.*—The law in force at the time and place of making a contract, and when it is to be performed, becomes part of the contract both as to its stipulations and the remedy provided for their enforcement. After the contract is thus entered into, subsequent legislation can not change the remedy so as to impair the obligation of the contract as it stood at the time it was entered into.—*Comm'r's Court v. Rather*..... 434
15. *Revenue law of 1868; section 93 of; unconstitutionality of.*—Section 93 of the revenue law of 1868, which requires the owner of land sold for taxes to deposit double the amount of the purchase-money, &c., before he shall be allowed to prosecute or defend any suit for the same against the purchaser, is unconstitutional.—*Stoudenmire v. Brown*..... 699

CONTINUANCE.

1. *Continuance, order of; construed in case at bar.*—An order of court continuing a cause which is expressed in the following words: "Came the parties by their attorneys, and on motion of the plaintiff for a continuance of this cause, it is ordered by the court that this cause be continued by the plaintiff, on payment of the costs in this behalf expended in ninety days," is only a continuance on terms; but it does not dismiss the cause, if the terms thus imposed are not complied with.—*Ex parte Abrams*..... 151
2. *Same; when court can not strike cause from docket on failure to comply with order.*—If the plaintiff at the next term of the court after the continuance, is ready and willing to pay the costs, and tenders the same to the court before the cause is called for trial, the court can not strike the cause from the docket, because the costs were not paid in ninety days, as limited in the order of continuance.—*S. C.*

CONTINUANCE—CONTINUED.

3. *Mandamus*; when proper to compel restoration of cause to docket.—And if the cause is thus stricken from the docket, this court will order its restoration by *mandamus* to the court below.—*S. C.*

CONTRACT.

1. *Law as to enforcement of*; how can not be changed.—The law in force at the time and place of making a contract, and when it is to be performed, becomes part of the contract, both as to its stipulations and the remedy provided for their enforcement. After the contract is thus entered into, subsequent legislation can not change the remedy so as to impair the obligation of the contract as it stood at the time it was entered into.—*Comm'rs Court v. Rather et al.*..... 434
2. *What is void.*—A note, the consideration of which is the compromise of a note given for the loan of Confederate treasury-notes, is void as against the public policy of the State and of the United States.—*Wilson v. Bozeman.*..... 71
3. *Negotiable note, given in part for Confederate money*; void as to immediate parties to note.—A negotiable promissory note, the consideration of which is partly a loan of Confederate treasury-notes and partly a sale of goods, is void as between the immediate parties to it, but it is valid in the hands of an innocent indorsee, who is a *bona fide* holder for valuable consideration, without notice of the illegality, unless it be made wholly void by statute in the hands of such indorsee.—*Bozeman v. Allen.*..... 512
4. *Same*; as to when illegal consideration will not avoid contract.—A negotiable promissory note in the hands of an indorsee who is a *bona fide* holder for valuable consideration, without knowledge of the illegality, is not affected by this rule of law. Such indorsee may recover on such note, notwithstanding the illegality, (3 Kent, 79, 80,) unless some statute declares the contract a nullity *ab initio*.—*S. C.*
5. *What not void.*—Although a loan of Confederate currency is not a sufficient consideration for a promise to pay money, contracts for the sale and purchase of property, involving its use and circulation, are not void.—*Cannon v. McNab & Bank.*..... 99
6. *Same.*—The violation of its charter by an incorporated bank, in circulating as currency notes or bills not payable on demand, does not vitiate a contract made by the bank with other parties involving the circulation of such notes or bills.—*S. C.*
7. *What without consideration.*—A promissory note given for the debt of another, on the assurance of the payee that the agent of the debtor will pay it on request, but without the knowledge or assent of such debtor or his agent, is without consideration, notwithstanding the note is made payable sometime after the transaction, and the claim against the debtor is receipted and delivered to the maker.—*Stoudenmire v. Ware.*..... 589
8. *Contract of sale*; what held to be a mortgage.—A contract purporting to be a sale, by the terms of which the vendee is to sell the property

CONTRACT—CONTINUED.

and out of the proceeds of the sale pay an antecedent debt of the vendor, with interest and expenses, any excess to be returned to the vendor, and any deficiency to be made good by him, is in effect a mortgage.—*Cannon v. McNab & Bank*..... 99

9. *Contract, what administrator can not make so as to bind estate of decedent.* D., in his life-time, bought land of S., and died leaving part of the purchase-money due and evidenced by promissory note; S. made title to D., but retained a vendor's lien with his note. After D.'s death, F. was appointed his administrator, and as such he obtained an order of court to sell the land. S. then proposed to set up his lien and give notice of it to the purchaser under the sale by F. But F., fearing that this would injure his sale under the order of court, agreed in writing with S., that if S. would abandon his lien and allow the land to be sold free of the lien, then F. would appropriate so much of the purchase-money derived from the sale under the order of court, as might be necessary, for the payment of S.'s note for the purchase-money due him from D.'s estate. S. accepted this agreement of F. as the administrator of D., and abandoned his lien on the land, and they both joined in written agreement to that effect. The land was sold free of the lien, under the order of court, by F. as the administrator of D., for a much larger amount than S.'s note; but after the sale, F. refused and failed to comply with his agreement with S.,—*Held*, that such an agreement between F. and S. is the personal contract of F., and not his contract as administrator of D., and can not bind the estate; that on the breach of such an agreement, F. may be sued at law, where the remedy is without uncertainty or embarrassment.—*Humes' Adm'r v. Fariss*..... 615

10. *Lease, contract of; construed.*—In a contract of lease for three years, from November 1, 1864, for \$4,500 a year, payable quarterly, in such currency as the banks in Mobile usually received and paid out at the time, the lessee was authorized to put the property, much out of repair, into tenantable order, the cost of the repairs to be deducted from the rent as it fell due. On the 19th January, 1865, the lessors acknowledged, in writing, an account of \$6,830 for the repairs to be "a credit, that is say, so much paid on the rent of the building leased." The lease terminated by consent May 3, 1866,—*Held*, in a suit by the lessors to recover rent from May 1, 1865, to May 3, 1866, that the lessee was not indebted. The change of currency in the spring of 1865, from Confederate to United States treasury notes, could have no effect to reduce the claim for repairs previously estimated and credited on the rent.—*Mobile Co. v. Hagan*..... 54

11. *What is usurious.*—C., in 1866, sold land to N. for \$2,000 cash and twenty-three bales of cotton, weighing each five hundred pounds; the money was paid, N. was put into possession of the land, and the cotton was agreed to be delivered about the first of January following; but N. was only able to deliver twelve bales of the twenty-three when the cotton fell due; this left eleven bales unpaid. At the time of the payment of the twelve bales, the cotton was worth thirteen

CONTRACT—CONTINUED.

cents per pound ; C. was then willing to "indulge" N. "in the payment" of said eleven bales yet "remaining unpaid ;" and in order to do so, agreed with him to take a mortgage on his crop of that year, and postpone the payment of the eleven bales of cotton until some time in the year following, but on a second failure to pay the cotton N. was to account for it at thirty cents per pound. On a bill filed by C. against N. to foreclose his vendor's lien on the land sold to N., C. is entitled to recover only the money value of the eleven bales of cotton when they fell due on the contract of sale, and interest thereon at eight per cent. per annum. Any thing more than this was usurious ; and if demanded, only the value of the eleven bales, or what remained due thereon at the date the same fell due on the contract of sale, without interest, could be recovered.—Rev. Code, § 1831.

- Neel v. Clay*..... 253
12. *What contract between creditor and principal debtor will not discharge surety, unless injury result.*—A creditor, having instituted suit against the principal debtor and his surety, afterwards, without the knowledge or consent of the surety, agreed with the principal, that on his paying a portion of the interest due and the costs, to dismiss the suit and indulge him further, without specifying any day or time to which indulgence was to be given. The agreement was carried into effect and the suit dismissed. The principal debtor was afterwards adjudged a bankrupt, and obtained a discharge before the present suit,—*Held*, that the surety was not thereby discharged, unless he was in fact injured by the agreement between the principal debtor and creditor.—*David v. Malone*..... 428
13. *Presumption as to common law governing as to contracts made in other States.*—Under the laws of Alabama, railroad companies are common carriers, and subject to all the liabilities of such carriers. Where suit is brought in this State against a common carrier for failure to deliver freight received for transportation, (under contract made and to be performed wholly in another State,) it will be presumed, in the absence of proof to the contrary, that the common law, as to common carriers, prevailed in the State where such contract was entered into and was to be performed.—*Southwestern Railroad Company v. Webb*, 585

See VENDOR AND PURCHASER.

FACTOR.

As to contracts which married women, with separate statutory estates, may enter into—

See HUSBAND AND WIFE.

CORPORATIONS, PRIVATE AND MUNICIPAL.

1. *Act to establish Mobile Charitable Association, &c. ; what right did not confer.*—The act of the general assembly of Alabama, entitled "An act to establish the Mobile Charitable Association, for the benefit of

CORPORATIONS, PRIVATE AND MUNICIPAL—CONTINUED.

- the common school fund of Mobile, without distinction of color," approved December 31st, 1868, does not authorize the "partnership association," therein mentioned, to keep or exhibit a table for gaming. The awards and distributions, authorized by said act, can not be determined by means of the "roulette wheel," or by the use of the "oblong box and balls," used in the manner that "keno" is usually played; such a method of distributing awards is not authorized by said act. (*By all the Judges.*)—*Horst, Mayor, v. Moses*..... 129
2. *Act to establish Mobile Charitable Association; unconstitutionality of.*—The act to establish the Mobile Charitable Association, &c., approved December 31st, 1868, is repugnant to article IV, section 2, of the State constitution, for variance between the subject of the act and that expressed in its title. It is also violative of article I, section 32, of the State constitution, because it confers an exclusive privilege on the partnership..... 129
(PETERS, J., dissenting.)
3. *Power of general assembly to confer exclusive privileges; test of.*—The test of the power of the legislature to confer franchises on particular individuals is, whether the privilege conduces to public good, and is such as must be committed to a few in order to be available.—*S. C.*
- PECK, C. J.—Held, 1. That the act of the 31st December, 1868, did not create a contract between the State and the parties and their associates named in said act, but was a mere proposal that only became a contract on the payment of the sum named in the second section of said act.—*S. C.*
2. That such contract was not a contract for the period of ten years, but for one year only, from the date of said payment.—*S. C.*
3. That as it was at the mere option of said parties and their associates, at the end of the year to renew, or not to renew said contract, the State had the same option to withdraw her proposal and to repeal said act.—*S. C.*
4. That as the State repealed said act on the 8th of March, 1871, (book of acts, p. 217,) when no contract, in fact, existed between her and said parties and their associates, the payment made by them to the superintendent of common schools of the county of Mobile, after the repeal of said act, was a payment made without authority of law, and did not authorize them to do business under said act of 31st December, 1868.—*S. C.*
5. And if, after the repeal of said act, they proceeded to do business under the same, and in doing so violated the laws of said city of Mobile against gaming, then they were liable to be prosecuted for such violations, in the same manner as other persons for like offenses.—*S. C.*
- PETERS, J.—In an opinion concurring in the judgment rendered, but dissenting from the reasoning employed by the majority,—Held, 1. That the act of the 31st December, 1868, creating the "Mobile Charitable Association," grants a "franchise" to "I. C. Moses & Co."

CORPORATIONS, PRIVATE AND MUNICIPAL—CONTINUED.

- and their "associates," upon valuable consideration. This is a contract, which the legislature can not impair by a repealing act.—*S. C.*
7. That the 32d section of the first article of the State constitution does not affect this act. That section forbids the grant of "hereditary" franchises and privileges only, not merely exclusive privileges for a limited time.—*S. C.*..... 129
8. That the *thirteenth* article of the constitution on "corporations," is not intended to apply to such a grant as this. It controls a "general law of incorporations," or "special laws passed pursuant" to that article.—*S. C.*
9. That the title of the act contains but one subject, which is clearly expressed.—*S. C.*
10. *Marion, town of; power of under charter to license retail liquor dealer.*—The town of Marion, in Perry county in this State, is authorized by its act of incorporation and its by-laws to require a person proposing to sell spirituous liquors by retail in the limits of said town, to purchase a license from the corporate authorities for the same, although he has obtained a State and county license; and moneys paid for such license, although paid under protest, can not be recovered back, in an action of debt or assumpsit against said corporation.—13 Ala. 341, 343; Pamph. Acts 1869-70, pp. 110-17, § 16.—*Welch v. Mayor.*..... 291
11. *Selma, city of; charter does not authorize to license gaming.*—The mayor and councilmen of the city of Selma have no authority, under the charter of said city, to license a keno table, to be kept for gaming.—*Schuster v. State.*..... 199
12. *Ordinance No. 50 of the city of Mobile, construed.*—Under ordinance No. 50 of the city of Mobile, a green grocer, doing business in said city, has no right to use his own cart to deliver meat to his customers within the city limits, without first obtaining a license for the same from the corporate authorities. The fact that no charge is made for the delivery, does not alter the case.—*Heller v. Mayor of Mobile.*..... 218

COSTS.

1. *Order as to payment of, how construed.*—An order of court continuing a cause which is expressed in the following words: "Came the parties by their attorneys, and on motion of the plaintiff for a continuance of this cause, it is ordered by the court that this cause be continued by the plaintiff, on payment of the costs in this behalf expended in ninety days," is only a continuance on terms; but it does not dismiss the cause, if the terms thus imposed are not complied with.—*Ex parte Abrams.*..... 151
2. *Same; when court can not strike cause from docket on failure to comply with order.*—If the plaintiff, at the next term of the court after the continuance, is ready and willing to pay the costs, and tenders the

COSTS—CONTINUED.

- same to the court before the cause is called for trial, the court can not *strike* the cause from the docket, because the costs were not paid in ninety days, as limited in the order of continuance.—*S. C.*
3. *Revenue law of 1868; section 93 of; unconstitutionality of.*—Section 93 of the revenue law of 1868, which requires the owner of land sold for taxes to deposit double the amount of the purchase-money, &c., before he shall be allowed to prosecute or defend any suit for the same against the purchaser, is unconstitutional.—*Stoudenmire v. Brown*..... 699
4. *Actions commenced by non-residents; when should be dismissed.*—All actions commenced by or for the use of non-residents of this State, in the courts of the State, should be dismissed on motion unless security for costs be given previous to the issuance of the summons.—*Stillman, Marvin, Hall & Co. v. Dunklin & Co.*..... 175
5. *Same; no limit to right to move to dismiss.*—There is no limitation of time confining this motion to a particular term of the court in which the suit is pending. It may be made at any time before the trial, if the right is not waived.—*S. C.*
6. *Security for costs; what insufficient, but will prevent dismissal of suit.*—A deposit of ten dollars with the clerk of the court, as security for the costs of a suit commenced by a plaintiff who is required to give such security, is insufficient in amount, but is not an omission or failure to give security. The plaintiff may perfect the security.—*Stribling v. Bank of Kentucky*..... 451
7. *Solicitor's fee; when properly allowed, as for a conviction of assault with weapon.*—If a party is indicted for an assault with intent to murder with a pistol, knife or other weapon, and puts in a plea of guilty of a simple assault, his plea is an admission of the charge as made, denying only the intent. In such a case, the solicitor's fee is fifteen dollars. *Adams v. State*..... 421
8. *Revenue law of 1868, section 136 of; what laws did not repeal.*—Section 136 of the revenue law of 1868 does not repeal the statutes in reference to the fees and costs of judicial litigation.—*S. C.*

COUNTIES.

1. *Action against county for damages from defective bridge; what allegation necessary.*—In an action against a county for damages occasioned by a fall from an imperfect bridge, established under contract with the commissioners court, made before the adoption of the Code of Alabama, the declaration should show that the bridge was a *toll-bridge*, and that the contract was such an one as the commissioners court had authority to make.—*Barbour county v. Horn*..... 566
2. *Same; evidence of wealth or poverty of plaintiff or defendant irrelevant; evidence of disabling effect of injury is material.*—In an action against the county, to recover damages on account of injuries inflicted by a fall from a bridge built by contract with the commissioners court, the jury can not look to the wealth or poverty of the county or of the

COUNTIES—CONTINUED.

- plaintiff, in making up the amount of their verdict. But they may consider the disabling effects of the injuries, whether past or prospective.—*S. C.*..... 566
3. *Counties; for what may be sued.*—Counties in this State are incorporations, established for specific and defined purposes, and are liable only for wrongs committed in the use or misuse of the corporate powers conferred on them.—*S. C.*
 4. *Same; liability of, in regard to public bridges*—Under our law, no general liability is imposed upon counties for injuries resulting from defective or unsafe condition of bridges, built for public use on the public highways.—*S. C.*
 5. *Same.*—The liability of counties in such cases is special, and defined by statute.—*S. C.*
 6. *Same; complaint against; what must show.*—A complaint against a county to recover damages for a fall resulting from the insufficiency or unsafe condition of a public bridge, must set forth a statement of facts which show the existence of this special liability. Among other things, it must be stated that no guaranty had been taken from the builder of the bridge, or that such a guaranty had been taken, and that the time during which it was to continue had expired before the occurrence of the injury complained of.—*S. C.*
 7. *Revised Code, section 1396 of; to what cases applies.*—Section 1396 of the Revised Code, which gives a right of action for injuries occasioned by defect in a bridge, &c., is applicable to a suit brought against a county for such injuries, although the bridge may have been built before the passage of the act, if the injury complained of occurred after its passage.—*S. C.*
 8. *County bonds; power to levy tax for payment of.*—Where a statute (under which a county issued bonds, a series of which fell due annually for a period of ten years,) provided that “as soon as” certain prescribed conditions were complied with, “and annually thereafter for a period of ten years,” the court of county commissioners should levy and assess a tax sufficient to pay the series falling due each year, it was held, that the failure to assess and collect the tax within the time prescribed, did not thereafter limit or destroy the power to levy and collect the tax, but that the power existed as long as the legal obligation to pay the debt subsisted.—*Commissioners Court v. Rather.* 495
 9. *Bonds issued by county of Limestone under act of December 14, 1855; create valid obligations against the county, the payment of which will be enforced by mandamus.*—The bonds issued by the court of county commissioners of Limestone county, under the act entitled “An act to authorize the commissioners court of Limestone county, State of Alabama, to subscribe to the stock of the Tennessee and Alabama Central Railroad Company,” passed over the veto of the governor on the 14th December, 1855, create a valid debt against the county, which are not required to be presented for allowance to the commissioners court; and the commissioners court, refusing to levy and

COUNTIES—CONTINUED.

- assess a tax, as authorized by law, to pay the bonds, were compelled to do so by *mandamus*, which was held to be the appropriate remedy to enforce the payment of the bonds.—*S. C.*..... 436
10. *Suspension of proceedings under act to suppress murder, lynching, &c., approved December 28, 1868 ; when proper.*—The arrest and putting on trial of one of several offenders, on the charge about which suit is brought against a county, under the provisions of section 6 of "An act to suppress murder, lynching, and assaults and batteries," approved December 28th, 1868, authorizes, under the provisions of section 7 of the same act, a suspension of proceedings in the suit against the county, until the result of the apprehended person's trial shall be known.—*Ex parte Brooks.*..... 423

COURT, CIRCUIT.

1. *Judgment of ; when will be reversed.*—A judgment by default rendered in the circuit court, on the trial of an appeal from a justice, against the appellee, who has not been notified of the appeal, will be reversed.—*Steadman v. Seawell & Minshill.*..... 519
2. *Recovery, amount of in circuit court ; how arrived at where offset is proved.*—Where, on appeal to the circuit court from the justice's court, the proof shows a larger sum due the plaintiff than is claimed in his complaint, and the defendant proves a set-off less than the amount of plaintiff's claim, the measure of recovery is the sum left after deducting the amount of the set-off from the amount claimed, and not from the greater amount proved to be due the plaintiff.—*Long v. Bakefield.*..... 608
3. *Justice of the peace, jurisdiction of ; test of on appeal to circuit court.* The test of the jurisdiction of the justice's court is the amount of the plaintiff's demand in controversy, and not as affected by offsets. *S. C.*
4. *Same ; objection to jurisdiction of, how made.*—An objection to the jurisdiction of the justice in respect to the amount in controversy must be taken by demurrer or plea in abatement. The plaintiff can not be nonsuited because the proof develops a larger sum due him than he has claimed.—*S. C.*

COURT, CITY OF MOBILE.

See that title under CRIMINAL LAW.

COURT, JUSTICE.

See CIRCUIT COURT.

COURT, PROBATE.

JURISDICTION.

1. *Probate court ; when obtains jurisdiction to order sale of decedent's lands for distribution.*—An application to the probate court by an executor

COURT, PROBATE—CONTINUED.

- or administrator of a deceased person to sell the lands of the estate for distribution is, essentially, a proceeding *in rem*, and when the court has acquired jurisdiction by a petition filed containing the jurisdictional facts, an order of sale will not be void for errors that may intervene in the after proceedings of the case.—*DeBardelaban v. Stoudermire*..... 646
2. *Void order of sale; who may petition to have set aside.*—If, however, the petition is insufficient to give the court jurisdiction, the order of sale and a sale made under it will be void, and may be set aside and vacated in the court by which the order was made, on the application of any person or persons interested in, or prejudiced by, said order of sale.—*S. C.*
 3. *Jurisdiction; what construction will be put upon words used in petition, to uphold.*—The petition need not pursue accurately the language of the statute; any words that necessarily convey to the mind all that the statute requires will be sufficient, and the words used should be construed liberally and favorably, to sustain the jurisdiction of the court and the validity of the order of sale.—*S. C.*
 4. *County in which lands are situate; what description of lands will support jurisdiction.*—If the petition omits, in words, to state that the lands are in the county, or within the jurisdiction of the court in which the application is made, yet, if such a description is given as to leave no real difficulty in identifying the lands intended, it will be sufficient, especially if no objection is interposed before the final order of sale is made.—*S. C.*
 5. *Decedent, sale of lands of; when order for not void.*—An executor's or administrator's sale of the lands of a decedent, under order of court, to pay debts, is not void, if it appears from the record of the proceedings on the application in the probate court for such order, that a proper application or petition made by such executor or administrator was filed in the proper court, and that the parties interested had proper notice of the application before the order was granted.—*Rev. Code, § 2222; 41 Ala. 26, 39.—Spragins v. Taylor*..... 520
 6. *Same; jurisdiction of probate court to order sale; when attaches.*—The filing of the application or petition for the order of sale by the executor or administrator, containing the proper allegations, and descriptions of the land and parties, as required by the Code, gives the court jurisdiction to hear and determine the case by order or decree.—*S. C.*
 7. *Same; effect of irregularities after jurisdiction attached.*—And whatever irregularities may intervene after jurisdiction attaches by filing the application for sale, are but errors, and they do not render the judgment of the court void for want of jurisdiction; unless it is shown that there has been some neglect of a statutory requirement, which declares the proceeding void on that ground.—*Rev. Code, § 2225.—S. C.*
 8. *Same.*—The facts, that the petition or application is signed in the

COURT, PROBATE—CONTINUED.

- name of the petitioner "by his attorney;" that the petition or application is not verified on oath; that no guardian *ad litem* was appointed for the minors interested in the estate to be sold before the hearing, or that the report of the sale was not verified by the oath of the petitioner, do not render the sale void or defeat the jurisdiction of the court. These are but irregularities or errors which do not render the judgment or order of the court a nullity.—*S. C.*
9. *Revised Code, § 2221; what allegation equivalent to the word "equitably" used therein.*—An allegation in a petition to the probate court for an order to sell the land of a decedent under section 2221 of Revised Code, that the same can not be "fairly" divided, &c., is equivalent to saying that it can not be "equitably" done.—*Warnock v. Thomas et al.* 463
10. *Decree; for what reason, not void.*—A decree for the sale of the land of a decedent, and of confirmation of such sale, are not void because rendered by a probate court of the late insurrectionary State government. 463
11. *When has not jurisdiction to decree money value of support allowed by will, &c.*—A distributee was entitled to support out of an estate, free of charge during the time it was kept together, but did not receive it,—*Held*, that on settlement by the executor, the probate court had no jurisdiction to ascertain its money value, and decree the amount to her in the distribution.—*Montgomery, Ex'or, v. Bowen.* 353

For practice and proceedings in—

See ESTATES OF DECEDENTS,
EXEMPT PROPERTY,
EXECUTORS AND ADMINISTRATORS,
GUARDIAN AND WARD.

COURT, SUPREME.

1. *What practice will be adopted by supreme court to give it control of inferior jurisdictions.*—It is the duty of this court, to enable it to carry out the powers with which the constitution has invested it, of exercising "a general superintendence and control of inferior jurisdictions," to adopt such course of proceeding as will make its control complete. 387
2. *Original jurisdiction of, not subject to legislative control.*—The appellate jurisdiction of this court is exercised under such restrictions, not repugnant to the constitution, as may from time to time be prescribed by law; but the legislature has no power to prescribe the mode or manner in which it must exercise its power to issue writs of injunction, *mandamus*, *habeas corpus*, *quo warranto*, and such other remedial and original writs as may be necessary to give it "a general superintendence and control of inferior jurisdictions."

See this title under CRIMINAL LAW.

For practice in,

See ERROR AND APPEAL.

CRIMINAL LAW.

ACQUITTAL.

1. *Conviction of one of two felonies charged in separate counts of indictment ; effect of, as to felony not passed on by jury.*—A verdict finding the defendants guilty of burglary on the trial of an indictment charging, in separate counts, both burglary and grand larceny, is tantamount to an acquittal of grand larceny, and thereafter expurges that charge from the indictment.—*Bell and Murray v. State*. 685
2. *Same ; acquittal, by what not impaired.*—The acquittal thus obtained is final, and not impaired by a judgment rendered by the appellate court, on the defendant's appeal, reversing the conviction for burglary and remanding the cause for further proceedings.—*S. C.* 686
3. *New trial on reversal ; on what charge defendant is liable to be retried.*—The acquittal of grand larceny on the first trial being final, and in contemplation of law obliterating that charge from the indictment, takes away any legal foundation for a verdict on the second trial, finding the defendants "guilty of grand larceny, as charged in the indictment."—*S. C.*
4. *Same ; what will operate an acquittal.*—Such a verdict is a nullity, and is no legal reason for discharging the jury from their deliberations on the charge of burglary, the only one remaining in the indictment. If the jury are discharged because of the rendition of this void verdict, without the consent of the defendants, the discharge operates an acquittal of the burglary.—*S. C.* 686

ADMISSIONS AND DECLARATIONS.

See EVIDENCE under this title, 29, 30, 31, 32.

ADULTERY.

5. *Living in adultery ; what acts do not constitute, within meaning of Code.*—On the trial of a charge for living together in adultery or fornication, if the evidence tends to show that the accused parties lived at different places, it is an error in the court to refuse to charge the jury, at the request of the defendants, that if the jury believe, from the evidence, that the man lived in the jail and the woman at another place, and that they did not live together in adultery or fornication, they should acquit the defendants ; and that before the defendants or either of them could be convicted the evidence must satisfy their minds beyond a reasonable doubt, that the defendants "did more than occasional acts of illicit or criminal intimacy."—*Quartemas et al v. State*. 269

ASSAULT—ASSAULT WITH INTENT.

6. *Solicitor's fee ; when properly allowed, as for a conviction of assault with weapon.*—If a party is indicted for an assault with intent to murder, with a pistol, knife or other weapon, and puts in a plea of

CRIMINAL LAW—CONTINUED.

- guilty of a simple assault, his plea is an admission of charge as made, denying only the extent. In such a case, the solicitor's fee is fifteen dollars.—*Adams v. State*. 421
7. *Revenue law of 1868, section 136 of; what laws did not repeal.*—Section 136 of the revenue law of 1868 does not repeal the statutes in reference to the fees and costs of judicial litigation.—*S. C.*
- See CRIMINAL LAW, EVIDENCE, 36, 37.

APPRENTICE AND LABOREES—ENTICING OR DECOYING AWAY.

8. *Indenture of apprenticeship made by probate judge under section 1450 of Revised Code; how regarded.*—An indenture of apprenticeship, made by a probate judge, under section 1450 Revised Code, is to be regarded as a deed, and when offered as evidence its execution must be proved as other deeds.—*Owen v. State*. 328
9. *Same; jurisdiction of probate judge, what sufficient to show.*—The jurisdiction of a probate judge in any particular case sufficiently appears, if it be stated in the indenture of apprenticeship itself, that the parents of the child thereby bound out are unable to provide for its support.—*S. C.*
10. *Revised Code, section 3691 of; to what case does not apply.*—Section 3691 of the Revised Code, relative to enticing laborers, &c., does not apply to a case where the accused had a prior valid, though verbal, contract with the laborer, the term of which had not expired, and which the prosecutor enticed him to abandon.—*Turner v. State*. . . . 549

BAIL.

11. *Bail bond; what sufficient proof of execution of.*—On the rendition of judgment final against obligors on a forfeited bail bond, taken and approved by a justice of the peace, for the appearance of the principal at the circuit court, *scire facias* having duly issued to them to appear and show cause why judgment final should not be rendered, no further proof of the execution of the bail bond is required, where it is in proper form, than the bond itself, properly signed by the justice who took and approved it.—*Gresham et al. v. State*. 625
12. *Same; execution of, how denied.*—On appeal in such a case to the supreme court, the obligors can not object that no sufficient proof was made in the court below of the execution of the bond. If the obligors did not execute the bond, they should have set it up as matter of defense by proper plea in the court below.—*S. C.*
13. *Same; judgment nisi; what should state.*—A judgment *nisi* on a forfeited undertaking of bail should state the offense for which the accused was indicted.—*S. C.*
14. *Sci. fa.; what should state.*—A *sci. fa.* on such a judgment should set out the judgment, or recite it substantially.—*S. C.*
15. *Indictment for murder; will sustain forfeiture of appearance to answer for manslaughter.*—An indictment for murder of a certain person will sustain a judgment of forfeiture on a bail bond requiring the accused to answer a charge of manslaughter of the same person.—*S. C.*

CRIMINAL LAW—CONTINUED.

BILL OF EXCEPTIONS.

16. *Bill of exceptions; when judge not bound to sign.*—A judge is not bound to sign a bill of exceptions reserved and tendered in the court below, unless it contains "the point, charge, opinion, or decision, wherein the court is supposed to err, with such a statement of the facts as is necessary to make it intelligible."—Rev. Code, § 2755.—*Strawbridge v. State*. 308
17. *Same; what bill too imperfect to be established.*—A bill of exceptions is imperfect and insufficient if it merely refers to a charge without inserting it. The direction, "*here insert it*," or "*here set out the charge*," does not make the charge or other document thus referred to a part of it. And such an imperfect bill of exceptions can not be established in this court, in the manner prescribed by the Code.—Rev. Code, § 2753.—*S. C.*

BURGLARY.

18. *Burglary; description of house broken into; what sufficient.*—A count of an indictment for burglary which describes the house alleged to have been broken and entered with burglarious intent, as "a building belonging to the estate of John Whiting, deceased, in which goods, merchandise, &c., are kept for deposit," is sufficient, when it pursues the form laid down in the Revised Code.—*Murray & Bell v. State*. 675
19. *Same; count for burglary; by what not vitiated.*—A count in an indictment which alleges that the intent with which the building was broken and entered was to steal, is not bad, because it also alleges that the intent was executed by a larceny of goods in the building.—*S. C.*
20. *Revised Code, § 3695; indictment for burglary under; what description of property sufficient under.*—An indictment for burglary, under our statute, for breaking and entering the pick-room of a gin-house with intent to steal, is not bad on demurrer, because the gin-house is described as "the property of the estate of Mrs. Lewis." This is a sufficient description of the house alleged to be broken and entered, though it should appear that Mrs. Lewis was dead before the alleged time of the commission of the offense charged.—Rev. Code, § 3695.—*Anderson v. State*. 665
21. *Revised Code, § 3695; what averment in indictment under, constitutes charge of grand larceny, and not of burglary.*—Under section 3695 of the Revised Code, a count in an indictment which charges that the defendants "broke into and entered" a certain described building, mentioned in that section, and "feloniously took and carried away" certain specified personal property of a third person, "of the value of more than one hundred dollars," is a count for grand larceny, and not for burglary. To constitute a good count for burglary, there should have been an averment that the breaking and entry were "with intent to steal or to commit a felony."—*Bell & Murray v. State*. 675

CRIMINAL LAW—CONTINUED.

22. *Same; what count charges burglary only.*—A count which charges that the defendants “broke into and entered” a certain described building, included in section 3695 of the Revised Code, “with the intent to steal,” charges burglary only, and under such a count there can be no conviction for grand larceny.—*S. C.*
23. *Same; what count charges both burglary and grand larceny.*—Under a count charging that the defendants “broke into and entered” a certain described building, mentioned in section 3695 of the Revised Code, “with the intent to steal,” and “feloniously took and carried away” certain specified articles of personal property of a specified third person “of the value of more than one hundred dollars,” there may be a conviction for either or both of the offenses charged.—*S. C.*
24. *Burglary in a dwelling house; what necessary to constitute.*—There can be no conviction on an indictment for burglary in a dwelling house, unless it is proved that some one resided in the house.—*Fuller v. State*..... 273

COSTS.

See ASSAULT, 1, 2.

COURT—SUPREME.

25. *Appeal in criminal cases; duty and practice of supreme court as to.* In this case, no question of law having been reserved by bill of exceptions, and none otherwise distinctly appearing on the record, no errors having been assigned, and no counsel appearing and arguing the case or furnishing a brief to the court, the judgment of the court below was affirmed. It is not the duty of the court to hunt or fish for errors in such a case.—*Hunter v. State*..... 272
26. *Acquittal; when supreme court will order discharge of defendants from custody on reversal of judgment of lower court.*—In the case at bar, defendants having been acquitted of grand larceny on the first trial, and the unauthorized discharge of the jury, on the second trial, being tantamount to an acquittal of the charge of burglary, the whole indictment was disposed of, and the defendants thereby entitled to their discharge. Such a motion having been made and overruled in the court below, the supreme court on appeal reversed the judgment and sentence of the court below, and caused the appropriate order to be entered in this court, discharging the defendants.—*Bell & Murray v. State*..... 684

COURT—CITY OF MOBILE.

27. *City court of Mobile; criminal jurisdiction of.*—The city court of Mobile, within the boundaries prescribed by law, has the same jurisdiction in criminal cases that is conferred upon the circuit court in similar cases.—*Rev. Code, § 3930.*—*Levy v. State*..... 171
28. *Same; power to hold special terms.*—That court, at the discretion of the judge, may hold special terms “to deliver the jail of all persons charged with crimes and offenses.”—*Acts 1857-8, pp. 56-7, No. 74, § 3.*—*S. C.*

CRIMINAL LAW—CONTINUED.

I. EVIDENCE—ADMISSIONS AND DECLARATIONS.

29. *Confessions; defendant, when entitled to call for whole of.*—In criminal cases, if the State relies upon the confessions of a defendant, he is entitled, on cross-examination, to bring out all that he said, at the same time, on the same subject.—*Parke v. State*..... 266
30. *Same; jury may credit part, and discredit part of.*—Juries are not bound to give the same credit to every part of a defendant's confession, but may believe that which is against him, and disbelieve that which makes in his favor.—*S. C.*
31. *Confession; how to be considered.*—Confessions of a defendant, introduced against him in the prosecution, must be regarded as evidence in the cause, and considered altogether, both for and against the defendant.—*Levy v. State*..... 171
32. *Same; what proper charge as to.*—If the confessions thus let in are sufficient, if believed by the jury, to justify the defendant's acquittal, it is error to refuse so to charge the jury, on the motion of the defendant.—*S. C.*

II. ADMISSIBILITY, RELEVANCY, AND SUFFICIENCY OF.

33. *Indictment for betting at gaming table; what evidence irrelevant.*—On the trial of an indictment found in the criminal court of the city of Selma, for betting at a gaming table for gaming, or at a game called keno, evidence offered by the defendant that at the time of the playing the keno table had been licensed by the said city, is irrelevant, and to exclude it is not error.—*Shuster v. State*..... 199
34. *Same.*—So, too, evidence that it was the public impression in Selma that the said table had been licensed, and that it was no violation of law to bet at it, is irrelevant, and should be rejected.—*S. C.*
35. *Defendant in criminal trial; when can not call for all of conversation testified to by State's witness.*—Where a witness for the State, on cross-examination, states that he had a conversation with the defendant, before the offense is alleged to have been committed, and also states what he, the witness, said to the defendant,—this does not entitle the defendant to have all that was said, in such conversation, disclosed by the witness as evidence in his behalf.—*Addison v. State*... 478
36. *Opprobrious words; evidence of, when only admissible.*—Evidence of opprobrious words or abusive language used by the person assaulted, is good in extenuation only when the indictment is for an assault, assault and battery, or affray.—*Rev. Code, § 4198.*—*Levy v. State*... 171
37. *Indictment for assault with intent to ravish; what prosecutrix can not state.*—In a prosecution for an assault with intent to ravish, the prosecutrix should not be allowed to say, in giving testimony, that the defendant attempted to ravish her, but did not accomplish his purpose. It is a conclusion of law.—*Scott v. State*..... 420
38. *Same; what evidence not admissible on trial of.*—Nor is it competent for a witness for the State, on his examination in chief, to say that the prosecutrix, when making complaint to him, said certain scratches

CRIMINAL LAW—CONTINUED.

- on her neck were made by the accused in attempting to ravish her, unless in corroboration of her testimony, if she be assailed in the matter of her complaint.—*S. C.*
39. *Burglary; what evidence sufficient to convict of.*—On a trial under an indictment based on section 3695 of the Revised Code, which charges that the building burglariously entered was the property "of the estate of Mrs. Lewis," in which goods were kept, &c., proof of the facts alleged in the indictment, and that the house mentioned was erected on lands which belonged to Mrs. Lewis at her death, and were devised in her will to third persons, and that her estate was unsettled and in the hands of her executor for administration, will sustain a conviction.—*Anderson v. State*. 665
40. *Perjury; what proof will sustain conviction for.*—On a trial for perjury, in proving what the prisoner orally testified, it is not necessary that it be proved, *ipsissimis verbis*; it is sufficient to prove substantially what he said.—*Taylor v. State*. 157
41. *Stolen property, possession of, recent and unexplained; what evidence of.*—Possession of goods stolen from a house a short time after the theft, is competent evidence of the theft, if this possession is not shown to be innocent, and if the theft is connected with a burglary it is also competent evidence, so far as it goes, of the burglary also. *Murray & Bell v. State*. 157
42. *Possession of goods; what necessary to make evidence against accused.* To make the possession of goods evidence against a person charged with stealing them, the larceny must be proved.—*Fuller v. State*. . . . 273
43. *Stolen property; possession of, recent and unexplained; what evidence of.*—Possession of goods, stolen from a house, a short time after the theft, if the possession is not shown to be innocent, and if the theft was connected with a burglary, such unexplained possession is also competent evidence of the burglary.—*Murray & Bell v. State*. 675

III. VARIANCE.

44. *What immaterial as to name of owner of stolen property.*—Where the indictment for larceny charges the stolen goods to be the property of J. H. Dargin, and the evidence shows that his name is John H. Dargin, but that he was frequently called J. H. Dargin, this is not such a variance as entitles the defendant to an acquittal.—*Thompson v. State*. 165
45. *What material.*—An indictment charging three persons jointly with playing at a game of cards, at a public place, &c., in the form given in the Revised Code, (p. 810, Form 27,) is not supported by evidence that two of the defendants played together at the game, at a public place, and that the other defendant played at a game of cards at the same time and place, with persons not indicted—the two games being separate and distinct, and at different tables, and having no connection with each other. Only those persons who participated in the same game should be joined in one indictment.—*Lindsay v. State*. 169

CRIMINAL LAW—CONTINUED.

46. *What is not.*—On the trial of an indictment under section 3690 of the Revised Code, for enticing, decoying or persuading an apprentice to leave the service or employment of his master, if an indenture of apprenticeship is offered by the State, to prove that the person charged to have been enticed, &c., was an apprentice, and the name in the indictment is George Blair, and in the indenture he is called a certain boy, named George, this is not a variance, but a defective description that may be aided by parol proof.—*Owen v. State.* 281

GAMING.

47. *Keno; when within purview of § 3621 of Revised Code.*—The game called "keno," when kept or exhibited by one person, that all who desire to do so, may gamble at it, is, within the purview and meaning of section 3621, Revised Code, to be regarded as a table for gaming.—*Miller v. State.*..... 122
48. *Same; who interested within the meaning of.*—A party who has a place in the room where the said game is exhibited and carried on, and sells to the persons who play at said game, the cards which are used in playing the same, is, within the meaning of section 3621, interested or concerned in keeping or exhibiting a table for gaming.—*S. C.*
49. *Selma, city of; charter does not authorize to license gaming.*—The mayor and councilmen of the city of Selma have no authority, under the charter of said city, to license a keno table, to be kept for gaming.—*Schuster v. State.*..... 199

HOMICIDE.

50. *Opprobrious words; not excuse for homicide.*—No words, however insulting, will excuse a homicide. There must be peril to life or limb, or reasonable ground to suppose that such peril exists, before the law will permit the taking of life, under the excuse of self-defense.—*Taylor v. State.*..... 180

See title CRIMINAL LAW, 63, 64.

INDICTMENT.

51. *Section 3625 of Revised Code, when had on demurrer or appeal under.*—An indictment under section 3625 of the Revised Code, for knowingly suffering a game with cards to be played at, or in, the places named in said section, or in a "highway or some other place" not named in said section, is fatally defective, either on demurrer or on appeal.—*Perez v. State.*..... 356
52. *Burglary; description of house broken into; what sufficient.*—A count of an indictment for burglary which describes the house alleged to have been broken and entered with burglarious intent, as "a building, belonging to the estate of John Whiting, deceased, in which goods, merchandise, &c., are kept for deposit," is sufficient, when it

CRIMINAL LAW—CONTINUED.

- pursues the form laid down in the Revised Code.—*Bell & Murray v. State*..... 675
53. *Same* ; count for burglary ; by what not vitiated.—A count in an indictment which alleges that the intent with which the building was broken and entered was to steal, is not bad, because it also alleges that the intent was executed by a larceny of goods in the building.—*S. C.*
54. *Revised Code*, § 3695 ; indictment for burglary under ; what description of property sufficient under.—An indictment for burglary, under our statute, for breaking and entering the pick-room of a gin-house with intent to steal, is not bad on demurrer, because the gin-house is described as “the property of the estate of Mrs. Lewis.” This is a sufficient description of the house alleged to be broken and entered, though it should appear that Mrs. Lewis was dead, before the alleged time of the commission of the offense charged.—*Revised Code*, § 3695. *Anderson v. State*..... 699
55. *Revised Code*, § 3695 ; what averment in indictment under, constitutes charge of grand larceny and not of burglary.—Under section 3695 of the Revised Code, a count in an indictment which charges that the defendants “broke into and entered” a certain described building, mentioned in that section, and “feloniously took and carried away” certain specified personal property of a third person, “of the value of more than one hundred dollars,” is a count for grand larceny and not for burglary. To constitute a good count for burglary, there should have been an averment that the breaking and entry were “with intent to steal or to commit a felony.”—*Bell & Murray v. State*..... 684
56. *Same* ; what count charges burglary only.—A count which charges that the defendants “broke into and entered” a certain described building, included in section 3695 of the Revised Code, “with the intent to steal,” charges burglary only, and under such a count there can be no conviction for grand larceny.—*S. C.*
57. *Same* ; what count charges both burglary and grand larceny.—Under a count charging that the defendants “broke into and entered” a certain described building, mentioned in section 3695 of the Revised Code, “with the intent to steal,” and “feloniously took and carried away” certain specified articles of personal property of a specified third person, “of the value of more than one hundred dollars,” there may be a conviction for either or both of the offenses charged.—*S. C.*

INTENT.

See CRIMINAL LAW, under title CHARGE TO JURY, 67.

JUDGMENT—SENTENCE—CONVICTION.

58. *Conviction for grand larceny and burglary had under one count ; what punishment awarded*.—Where there is a conviction of both burglary and grand larceny, charged in the same count, but one punishment should be awarded.—*Bell & Murray v. State*..... 684

CRIMINAL LAW—CONTINUED.

59. *Same; where more than one conviction may be had on same indictment.*—Under a count charging that the defendants “broke into and entered” a certain described building, mentioned in section 3695 of the Revised Code, “with the intent to steal,” and “feloniously took and carried away” certain specified articles of personal property of a specified third person “of the value of more than one hundred dollars,” there may be a conviction for either or both of the offenses charged.—*S. C.*
60. *Conviction in capital case; what must affirmatively appear to sustain.*—On appeal to this court, in order to sustain a conviction for a capital offense, the record showing that the defendant was in actual confinement, it must appear affirmatively that a copy of the indictment and list of jurors summoned for his trial, were delivered to him one entire day before the day appointed for his trial, as required by section 4171 of the Revised Code.—*Morgan v. State*. 65
61. *Motion in arrest of judgment; upon what must be predicated.*—A motion in arrest of judgment can only be predicated on matter of record.—*S. C.*
62. *Same; what not ground for.*—That the jury, after being sworn and empaneled, for the trial of one charged with a capital offense, were permitted by the court to separate, and “mix with the crowd attendant on the court,” is not matter for arrest of judgment but for new trial.—*S. C.*

JURY—JURORS—CHARGE TO.

63. *Self-defense; when not erroneous in ignoring plea of.*—On the trial of a defendant charged with murder in the first degree, where the evidence shows that the accused was not forced to take the life of the deceased in order to save his own life or limb from serious peril, and had no reasonable cause to entertain a belief of such necessity to take life, a charge of court which ignores the excuse of self-defense is not erroneous.—*Taylor v. State*. 180
64. *As to self-defense; when may be properly refused.*—Where there is evidence showing that a homicide was perpetrated, under circumstances which did not compel the slayer to take life to save his own life or limb from peril, and which also show that the slayer had no reasonable cause to believe in the existence of any necessity to take life, charges as to the law of self-defense are abstract, and may be properly refused.—*S. C.*
65. *When inapplicable to evidence or assuming truth of, may be refused.*—A charge that is inapplicable to the issue, and calculated to mislead the jury, should be refused. So, too, a charge that assumes the truth of the evidence, and withdraws from the jury the consideration of its credibility, ought to be refused.—*S. C.*
66. *As to confessions.*—Where confessions introduced by the State against the defendant, are sufficient, if believed by the jury, to justify his acquittal, it is error to refuse so to charge the jury on defendant’s motion.—*Levy v. State*. 172

CRIMINAL LAW—CONTINUED.

67. *As to intent with which act was done; what should be refused.*—On the trial of indictment for betting at keno, the following charge, asked by the defendant, should be refused, to-wit: "If defendant, if he did bet, had no intention to violate the law of the State, the jury must acquit him."—*Schuster v. State*..... 199

DISCHARGE OF JURY—SEPARATION OF.

68. *When tantamount to acquittal of defendant.*—The discharge of a jury, charged with the trial of a defendant, without his consent and for an insufficient legal reason, operates an acquittal of all the charges upon which the jury did not render a verdict.—*Bell & Murray v. State*.... 684
69. *When unauthorized departure of juror accepted, will work reversal.*—On the trial of a capital felony, W. was summoned as a juror. Being sworn and examined by the court, he was pronounced competent, and was then accepted by the State and by the accused as one of the jurors for the trial. W. then informed the court that he was a member of a fire company and was therefore not liable to serve on the jury, and asked to be discharged. The court replied, that he could not be discharged. W. then told the court that he would discharge himself, and left the court room; and thereupon, without discharging W., the court caused another juror to be selected in his place, without the consent of the accused,—*Held*, that this was an error for which the judgment must be reversed.—*Powell v. State*..... 154
70. *Arrest of judgment; what not ground for.*—The separation of the jury, after the cause is submitted to them, is ground for a new trial, but not for arrest of judgment.—*Williams v. State*..... 85

EMPANNELING OF.

71. *In City Court of Mobile for special term, how drawn.*—The petit juries to attend at the special term of said city court may be regularly drawn as jurors for a regular term of the circuit court, or they may be organized as special juries for the same purpose.—Revised Code, §§ 4068, 4088. *Levy v. State*..... 172
72. *Same.*—When only a special jury is organized to try a criminal case in the city court at a special term, and no regular jury has been provided, it is a sufficient compliance with the law if the list of the special jury is delivered to the prisoner one entire day before the trial.—*S. C.*
73. *Juror; peremptory challenge of; how long remains open.*—On the trial of a felony, the defendant's right to a peremptory challenge of a juror is to be kept open until the juror is actually sworn. An acceptance (inadvertently made, by the defendant,) of a juror may be withdrawn, and the juror peremptorily challenged at any time before he is actually sworn.—*Murray & Bell v. State*..... 675
74. *Same; motion to quash venire, when properly overruled.*—In such a case, a motion to quash the venire, made by the accused, because no regular jury had been drawn and summoned and a list of their

CRIMINAL LAW—CONTINUED.

names delivered to the defendant, along with the names of the persons ordered to be summoned as special jurors for the trial, should be refused by the court.—*S. C.*

75. *Juror, name of as written in list; presumption as to ruling of court as to.*—It is proper to submit to the court the question whether the name of a juror on the list of those delivered to the defendant is properly or improperly spelled. And if upon inspection the court determines that the name is properly spelled, this decision is conclusive, if there is not other proof in the record of its incorrectness.—*Taylor v. State*..... 180

OATH ADMINISTERED TO.

76. *Oath administered jury in felony trial; what recital in record as to, sufficient.*—In capital and other felonies, when the oath administered to the jury is set out in the minute entry of the trial, and an essential part of the oath prescribed by section 4092 of the Revised Code is omitted, as, if it omits to state that the jury was sworn "a true verdict to render according to the evidence," the conviction will be erroneous. If, however, the entry does not pretend to set out the oath, but states that the jury "was duly sworn according to law," or "was duly sworn," in either case, it will be presumed the jury was properly sworn, according to the form prescribed in said section.—*Gardner v. State*..... 263

VERDICT OF.

77. *Conviction of one of two felonies charged in separate counts of indictment; effect of, as to felony not passed on by jury.*—A verdict finding the defendants guilty of burglary on the trial of an indictment charging, in separate counts, both burglary and grand larceny, is tantamount to an acquittal of grand larceny, and thereafter expurges that charge from the indictment.—*Bell and Murray v. State*..... 685

LARCENY,

78. *Dog; not the subject of larceny.*—There is no such property in dogs as makes them the subject of larceny in this State.—*Ward v. State*.. 161
79. *Stolen property, possession of, recent and unexplained; what evidence of.*—Possession of goods stolen from a house a short time after the theft, is competent evidence of the theft, if this possession is not shown to be innocent; and if the theft was connected with a burglary it is also competent evidence, so far as it goes, of the burglary also.—*Murray and Bell v. State*..... 675
- See also *Fuller v. State*, 273.
80. *Larceny, name of owner of property; what is immaterial variance as to name of owner.*—Where an indictment for larceny charges the stolen goods to be the property of J. H. Dargin, and the evidence shows that his name is John H. Dargin, but that he was frequently called

CRIMINAL LAW—CONTINUED.

J. H. Dargin, and wrote his name J. H. Dargin, this is not such a variance as entitles the defendant to an acquittal.—*Thompson v. State* 165

MERGER.

81. *Merger; what offenses not subject to doctrine of.*—Burglary and grand larceny being, under the provisions of the Revised Code, distinct felonies of the same grade and subject to the same nature of punishment, are not subject to the doctrine of merger.—*Bell and Murray v. State*..... 684

NEW TRIAL.

82. *What charge defendant liable to be retried on, on reversal.*—The defendants having been convicted of burglary under an indictment charging in separate counts both burglary and grand larceny, appealed to the supreme court, which reversed the conviction. The verdict of burglary was tantamount to an acquittal of the larceny. On the second trial the defendants were put on trial precisely as if there had been no former trial,—*Held*, the acquittal thus obtained is final, and not impaired by the judgment of the appellate court, reversing the conviction for burglary and remanding the cause for further proceedings.—*Bell and Murray v. State*..... 685
83. *What ground for.*—That the jury after being empaneled and sworn and charged with the trial of a capital offense, were permitted to separate and mix with the crowd attendant on the court, is not matter for arrest of judgment, but for new trial.—*Morgan v. State*.. 65
84. *Same.*—The separation of the jury after a cause is submitted to them is ground for new trial, but not for arrest of judgment.—*Williams v. State*..... 85

PERJURY.

See CRIMINAL LAW, 40.

SOLEMNIZING MARRIAGE CONTRARY TO LAW.

85. *Revised Code, §§ 3602 and 3603; unconstitutionality of.*—Sections 3602 and 3603 of the Revised Code, which prohibit the intermarriage of white persons and negroes, and forbids any person, authorized to solemnize the rites of matrimony, to do so in such cases, when applied to citizens of the United States, or of the State, are in contravention of the act of congress of April 9, 1866, known as the "civil rights bill," and repugnant to section 1 of the 14th amendment to the federal constitution, and to art. I, § 2, of the State constitution.—*Burns v. State*..... 195

VENIRE.

86. *Service of list of jurors, &c.; what is mere irregularity.*—The service upon a prisoner of a list of jurors, containing one less than the num-

CRIMINAL LAW—CONTINUED.

ber ordered by the court to be summoned, but more than the least number required by section 4173 Revised Code, is a mere irregularity, waived, unless objected to in the court below.—*Williams v. State*..... 185

See, also, JUDGMENT, 60.

VENUE.

87. *Change of venue; practice and rule governing granting of.*—Upon an application for a change of venue in a criminal case, both parties may be heard on *affidavits* in favor of or against the allowance of the application. And the court will allow the change or refuse it, according to the preponderance of the evidence.—*Ex parte Chase*, 43 Ala. 303.—*Taylor v. State*..... 180
88. *Same; what not sufficient objection to affidavits.*—It is not a sufficient objection to the affidavits read in support of such an application or against it, that several deponents have signed and sworn to the same statement of facts in one affidavit, if the affidavit is properly certified.—*S. C.*
89. *Same; court not bound to hear oral testimony in support of.*—It is not error for the court to refuse to hear oral testimony on an application for a change of venue. Such testimony should be made by affidavit.—*S. C.*
90. *Application for, what must state.*—An application for a change of venue in a criminal case must set forth specifically the reasons why the person charged with an indictable offense can not have a fair and impartial trial in the county in which the indictment was found, and must also be sworn to by the person so charged, else the court is not bound to hear, or receive or consider it.—*S. C.*..... 181
91. *Same; certificate of clerk.*—In a change of venue of a criminal case, the certificate attached to the transcript of the proceedings in the court from which the cause is removed, must show in what court the matters certified occurred, and be authenticated under the hand of the clerk and the seal of the court. If there be no seal, it must be so stated, and the connection of the clerk with the court must be otherwise represented.—*Williams v. State*..... 85
92. *Change of venue in criminal cases; how often can be allowed.*—The trial of a person charged with an indictable offense can be removed but once from one county to another.—*Ex parte Dennis*..... 304
93. *Agreement of counsel to change venue; effect of.*—An agreement between the attorneys for the defendant and the counsel for the prosecution, that such a trial may be returned to the county from which it was removed presents no legal reason for demanding such return, and an application for *mandamus* to compel the court in which the indictment is pending to return the trial of the cause to the court from which it was removed, will be denied.—*S. C.*..... 305

CRIMINAL LAW—CONTINUED.

VOTING—ILLEGAL.

94. *Act to regulate elections, approved February 26, 1872; unconstitutionality of.*—The act entitled "An act to regulate elections in the State of Alabama," approved the 26th of February, 1872, (as the same is published in the book of Acts of 1871-72, p. 15,) never acquired the force of law as a constitutional enactment of the general assembly of this State. The said act as published was never passed by the two houses of the general assembly, and is therefore without any validity as a law of this State, and imposes no legal obligation on any body. An indictment, framed under said act, for illegal voting is void, and on appeal from a conviction had on such indictment, the judgment and sentence of the court below will be reversed and the defendant discharged.—*Moody v. State*..... 115

WITNESS.

95. *Leading question; permitting or refusing to be asked; not revisable on error.*—Leading questions rest in the sound discretion of the court, and the ruling of the court, in either permitting or refusing to permit such questions to be asked, can not be assigned for error.—*Ad-dison v. State*..... 478
96. *Witness, mode of impeaching; what charge as to, erroneous.*—Where a witness is impeached, either by calling witnesses to depose to his general bad character, or by contradicting him, as to some statement alleged to have been made by him out of court, which he denies on his examination in court,—it is an error in the court to charge the jury to *throw aside* the testimony of such witness, and not to consider it, except in so far as it may be sustained or corroborated by other testimony in the cause.—*S. C.*
97. *Same; true rule as to impeachment of witness.*—The true rule in such cases, is not to throw aside the evidence of a witness thus impeached, but to submit all that may be said by or for him, and all that is said against him, to the jury, to give to both such weight and credit as justice, in the particular case, may seem to demand.—*S. C.*
98. *Inproperly overruling question; when error without injury.*—Where an objection to a question proposed to a witness is improperly overruled, if the question be not answered, it is an error without injury.—*Taylor v. State*..... 157
99. *Latitude of examination by defendant of State's witness.*—Juries are not bound to give the same credit to every part of a defendant's confession, but may believe that which makes against him, and disbelieve that which makes in his favor; for this reason too great strictness ought not to be observed in limiting the cross-examination of witnesses in such cases.—*Parke v. State*..... 267

CROP.

1. *Lien for advances; when may be enforced by attachment.*—A lien, created by contract, on the crop and stock of another for "advances"

CRIMINAL LAW—CONTINUED.

to assist in making the crop, is such a lien as may be enforced by attachment, as in case of attachment for rent.—Rev. Code, §§ 1860, 1858, 2961.—*McKinney, Surv. Part., v. Benagh*..... 358

2. *Same; when attachment not dissolved by death of defendant*.—In such a case, the attachment is but process to enforce the lien; and on the death of the defendant in such an attachment suit and the insolvency of his estate, the lien thus existing is not dissolved, as to the property attached subject to the contract lien. The court should enforce such lien by ordering the sale of such property, at the same time judgment is rendered for the debt or demand secured by the lien.—*S. C.*

See, also, MORTGAGE.

DAMAGES.

1. *Actual and punitive; guide for assessing*.—Punitive damages may be recovered for gross negligence. For a less degree actual damages alone should be assessed.—*M. & M. R. R. Co. v. Ashcraft*..... 16
2. *Punitive; how assessed*.—Punitive damages ought to bear proportion to the actual damages sustained. Wherever the assessment is manifestly unjust, whether it is too small or excessive, the court, in the exercise of a wise and just discretion, should award a new trial.—*S. C.*
3. *Ascertainment of, after judgment nil dicit; what evidence inadmissible*.—In ascertaining the damages to which the plaintiff is entitled, after judgment by default or *nil dicit* in trover, evidence which can only mitigate the damages by subverting the judgment, is inadmissible.—*Curry v. Wilson*..... 638
4. *Ascertainment of, for conversion*.—Where the quality of the goods converted is not shown, the jury assume that they were of the best quality.—*S. C.*
5. *In case of appeal for delay; how assessed*.—The damages allowed by section 2774 of the Revised Code in appeals from justices, when taken for delay, must be imposed by the court, not by the jury.—*Shorter, Papot & Co. v. Hightower*..... 526
6. *How arrived at in action against county for injuries for fall from bridge*.—In an action against the county, to recover damages on account of injuries inflicted by a fall from a bridge built by contract with the commissioners court, the jury can not look to the wealth or poverty of the county or of the plaintiff, in making up the amount of their verdict. But they may consider the disabling effects of the injuries, whether past or prospective.—*Barbour County v. Horn*..... 566
7. *Measure for breach of contract to deliver cotton*.—The pecuniary liability on a contract to deliver eleven bales of cotton, weighing each five hundred pounds, is, when the contract is broken, the money value of the cotton on the day agreed upon for its delivery or payment, when no price is fixed in the contract.—*Neel v. Clay*..... 252
8. *When chancery will allow, by way of hire*.—Where one part owner of a

DAMAGES—CONTINUED.

steamboat sold the entire interest to persons chargeable with notice of the rights of the other owner, which they and their vendor deny and repudiate, on a bill filed against them by such owner praying to have her interest established, and an account of the earnings, the defendants can not complain if her proportion of the reasonable hire of the boat during its detention be decreed to the complainant as damages.—*Graham v. Cook*. 163

9. *What allowed against sureties of sheriff, on indemnifying bond, for trespass.*—The sheriff having an attachment against the estate of McD., levied on the goods of W., and afterwards levied executions on judgments in the attachment suits against McD. on the same property, but refused to sell unless indemnified; whereupon, the plaintiff in attachment, with sureties, entered into an indemnifying bond conditioned "to hold the sheriff harmless from all liability and damage in consequence of the levy,"—*Held*, that the obligors on such bond are liable in an action of trespass to the owner of the property, (where it was sold,) for the value of the property at the time of its seizure under attachment, with interest thereon to the time of the trial.—*Screws et al v. Watson*. 629

DEEDS.

1. *What words of conveyance create statutory separate estate.*—A deed made August 12th, 1865, conveying to a married woman in the State lands situate here, "for her sole and separate use and benefit," creates in her a statutory separate estate, governed by all the restrictions and limitations contained in the Revised Code for the regulation of the "separate estate of the wife."—*Denechaud v. Berrey*. 590
2. *Same; effect of words "for sole and separate use," &c.*—The words, "for her sole and separate use and benefit," contained in such a deed, do not change the character of the estate which the married woman takes thereby. By force of the provisions of the Code, that would be the legal effect of the deed, although it contained no such words.—*S. C.*
3. *Acknowledgment of conveyance; what defective.*—An acknowledgment of a conveyance of land which does not recite that the grantor is known to the officer, is not in substantial compliance with the form prescribed by section 1548 of the Revised Code.—*Merritt v. Phenix*. 87
4. *Same; effect of.*—But a certificate, written upon such a conveyance, signed by an officer, that the maker appeared personally before him and acknowledged that he signed, sealed and delivered the foregoing deed to the grantee, is equivalent to the attest of one witness required by section 1535 of the Revised Code.—*S. C.*
5. *Recording of conveyance; when operates as notice.*—The recording in the proper office of any conveyance of property, which may be legally admitted to record, operates as a notice of the contents of such conveyance, without any acknowledgment or probate thereof, and its due execution may be proved.—*S. C.*

DEEDS—CONTINUED.

6. *Deed of trust; when has preference over judgment, &c.*—A deed of trust for valuable consideration, duly recorded, supersedes a judgment previously rendered, but on which no execution had issued at the date of the deed after the lapse of a term.—*Whitfield v. Clark*.. 555
7. *Deed; when will be reformed.*—A father, after the death of his son, leaving a widow and minor children, conveyed by deed to his administrator land which the son had occupied several years under a parol gift, intending to subject it to the claims of his creditors and his wife's dower, in the same manner as if the conveyance had been made before his death,—*Held*, that on a proper bill by the widow, equity will reform the deed, allot the dower, and apportion to the family the statutory provision of five hundred dollars worth of the land.—*Johnson v. Crutcher*..... 368
8. *Lost records of, &c.; when may be substituted.*—The lost records of deeds and other proceedings of the courts in this State, made during the late war, may be established and substituted under the act of the general assembly entitled "An act to authorize the substitution of lost records of judgments, and decrees of courts, and other records," approved January 18, 1866.—*Pamph. Acts 1865-66, p. 48, No. 18. Smith v. Ivey*..... 48
9. *What regarded as deed.*—An indenture of apprenticeship made by a probate judge, under section 1450 of the Revised Code, is to be regarded as a deed, and when offered as evidence, its execution must be proved as other deeds.—*Owen v. State*..... 328

DEBTOR AND CREDITOR.

1. *Debtor; what disposition may make of property.*—The owner of property, whether real or personal, may sell it to another person able and competent to buy it, if such sale is not made with fraudulent intent.—*Harkins v. Bailey*..... 376
2. *Same; insolvency of owner, when does not invalidate.*—Though the owner of property may be insolvent, and largely indebted at the time, he may make a fair sale of his property to a relation, if the sale be made without fraud. These, though badges of fraud, are not conclusive proof of it.—*S. C.*
3. *Absolute sale; when will not be treated as general assignment.*—An absolute sale of land by a debtor to his creditor, in payment of a subsisting debt, when made in good faith and without fraud, can not be treated as a general assignment, unless the proof clearly shows that it was so intended.—*S. C.*
4. *Principal debtor; what contract with, by creditor, will not discharge surety, unless injury is shown.*—A creditor, having instituted suit against the principal debtor and his surety, afterwards, without the knowledge or consent of the surety, agreed with the principal, that on his paying a portion of the interest due and the costs, to dismiss the suit and indulge him further, without specifying any day or time to which indulgence was to be given. The agreement was carried into

DEBTOR AND CREDITOR—CONTINUED.

- effect and the suit dismissed. The principal debtor was afterwards adjudged a bankrupt, and obtained a discharge before the present suit.—*Held*, that the surety was not thereby discharged, unless he was in fact injured by the agreement between the principal debtor and creditor.—*David v. Malone*. 428
5. *Creditor's bill under section 3442 of Revised Code; when without equity.* A bill filed under the provisions of section 3442 of the Revised Code, by a judgment creditor whose execution is not satisfied, to subject to its payment property held in trust for his debtor, is wanting in equity unless it alleges a return of "no property" or a partial satisfaction only.—*Mixon v. Dunklin*. 455
6. *Same; what facts do not dispense with necessity of averment of return of "no property" on execution.*—The fact that the judgment creditor was prevented from having execution at law upon his judgment, by certain military orders issued by the officer in command in this State, under the acts of congress commonly known as the reconstruction acts, does not dispense with the necessity for a return of "no property," so as to entitle the creditor to maintain a bill under section 3442.—*S. C.*
7. *Satisfaction of judgment; what does not amount to, in favor of surety.* A mere levy of an execution by the sheriff on property of the defendant, sufficient in value to satisfy it, is not a satisfaction of the judgment when the levy is released or abandoned without the concurrence of the plaintiff.—*Summerhill v. Trapp*. 363
8. *Same.*—The execution must be paid, or its payment defeated by the misconduct of the plaintiff, before a surety can complain.—*S. C.*

DETAINDER, UNLAWFUL.

1. *Tortious possession; when may be basis of action of.*—A tortious possession of land may become lawful by agreement of the parties, express or implied; and in that case unlawful detainer will lie to recover possession, upon demand in writing, after the termination of such lawful possessory interest.—*Bates, Adm'r, v. Ridgeway*. 611
2. *Secondary evidence of demand in writing; when admissible.*—In an action of unlawful detainer, secondary evidence of the demand in writing can not be received until the proper predicate has been laid for its introduction.—*S. C.*
3. *Notice to produce demand in writing; when not sufficient.*—In such action, a notice to produce the written demand, given by the plaintiff to the defendant's counsel at the trial, is not sufficient in point of time, without proof that the paper is in court, or so near that it can be obtained without delaying the trial. There is no presumption that the defendant or his counsel has it in court.—*S. C.*
4. *Misjoinder of parties plaintiff.*—Where a complaint in unlawful detainer by two plaintiffs, seeking the recovery of the whole premises detained by a defendant, showed that the two plaintiffs were each separately in possession of the tract of land; that each separately

DETAINDER, UNLAWFUL—CONTINUED.

rented his undivided interest in the lands to the same defendant, but at different times and upon different terms; that the terms of each lease had expired, and that each plaintiff had separately demanded possession of the undivided interest which he had rented to the defendant, and that the defendant refused to deliver possession after such demand,—*Held*, that it was bad, on a demurrer, for misjoinder of parties plaintiff.—*Ware & Wilson v. Warwick*. 295

DETINUE.

1. *Detinue for slaves; when emancipation no defense to*.—To an action of detinue for the recovery of slaves, commenced in 1852, it is no defense that the slaves were emancipated before the trial.—*Wilkinson, Adm'r, v. McDougal*. 517
2. *Same; what will defeat action*.—In such action, the plaintiff's right of recovery is defeated by the passage of his title to another before the trial, unless the defendant is a mere trespasser; but not by its extinction on account of the destruction of the property, whether by death, emancipation or otherwise.—*S. C.*

DOWER.

1. *Dower, claim of by widow; does not destroy right to claim five hundred dollars out of insolvent estate*.—A claim of dower by the widow does not deprive her and the minor children of her husband of the homestead exemption of \$500 worth of land out of his insolvent estate, under Revised Code, § 2061.—*McCuan v. Turrentine*. 68

EJECTMENT.

1. *By what law governed*.—An action of ejectment commenced in 1852 is governed by the law of that action as it existed under Clay's Digest. Such an action should be conducted as at common law, except the fictitious proceedings are abolished.—*Wilkinson v. McDougal*. 383
2. *Proceedings in, as to declaration, &c.*—In such an action, the tenant in possession, who is the real defendant, on being served with a copy of the declaration and notice, is required, under the consent rule, to confess lease, entry and ouster, and put in his plea of not guilty and insist upon his title only; after this, he can not demur to the declaration. If the declaration is insufficient, it should be set aside and amended.—*S. C.*
3. *What title the plaintiff must have to entitle to recovery*.—When this form of action is instituted for the recovery of a term for years, the plaintiff must have a good title as against the defendant, both when the action is commenced and when it is tried, or else he can not recover.—*S. C.*
4. *What will not support, against personal representative of decedent*.—A

EJECTMENT—CONTINUED.

plaintiff in ejectment can not recover against the personal representatives of a decedent on a parol gift of the land to him by the said decedent, though accompanied with the possession ; whether the consideration of the gift was the marriage of the plaintiff with his daughter or not.—*Conn v. Prewitt*..... 636

EMPLOYER—EMPLOYEE.

1. *Common employer ; when not liable for injuries to servant occasioned by neglect of fellow-servant.*—A common employer is not liable to his servant for injuries done to him through the negligence of his fellow-servant in the pursuit of their common business, without fault on his part.—*Ala. & Fla. R. R. Co. v. Waller*..... 459
2. *Same.*—He is liable, when the offending servant is incompetent in skill or prudence, within his knowledge, or his reasonable means of ascertainment.—*S. C.*
3. *Care required in selection of employes, &c.*—Ordinary care and diligence in the selection and supervision of servants or employes is not sufficient. There must be due or reasonable care and diligence proportionable to the hazard of the business.—*S. C.*
4. *Fitness of servants ; what plea as to, demurrable.*—The defendant's supposition of the fitness of the engineer, as a reason for retaining him, is, as a plea to the action, subject to demurrer.—*S. C.*
5. *What sufficient averment of negligence of servant.*—In an action of damages against a railroad company, by an administrator, for injuries causing the death of his intestate, an averment in the complaint that the intestate received the injuries from which he died by a collision of the defendant's trains, through the carelessness of its engineer in charge of one of them, is not subject to demurrer for an insufficient statement of facts.—*S. C.*

ERROR AND APPEAL.

I. WHEN APPEAL LIES.

1. *From refusal to order rule why mandamus should not issue.*—Where an application to show cause why a *mandamus* should not issue has been denied by an inferior court or judge, the petitioner may either take an appeal under the act of the 15th December, 1868, (Pamph. Acts, p. 410,) or he may renew his application to this court, setting forth under oath such a state of the case as shows that the court or judge who made the decision erred to his prejudice, and that he is entitled by the case made before such court or judge to the relief he seeks. *Ex parte Candee*..... 389
2. *When properly taken.*—Where an action, founded on a promissory note, is tried on plea of the general issue and failure of consideration, if on the trial the note is excluded by the court as evidence, on the defendant's objection, the plaintiff may save the point by bill of exceptions, suffer a non-suit, and appeal to this court to have the

ERROR AND APPEAL—CONTINUED.

- same set aside under section 2759 of the Revised Code.—*Hubbard, Guardian, v. Baker et al.*..... 491
3. *What judgment will not support.*—A judgment of the circuit court granting a new trial under section 2814 of the Revised Code, is not such a final judgment as will support an appeal.—42 Ala. 31, 167. *Carroll v. Vaughan.*..... 352
4. *Same.*—Where a complaint contains a count on a special agreement, with the common counts, and a demurrer to the special count is sustained, and the parties go to trial on the common counts, and on the trial evidence offered by the plaintiff is excluded by the court, and, thereupon, the plaintiff excepts to the ruling of the court, and suffers a non-suit under section 2759 of the Revised Code, and appeals to this court to have the non-suit set aside, the decision of the court on the demurrer can not be reviewed on such appeal.—*Durden v. James.*..... 33
5. *When dismissed.*—Where an appeal is taken from a decretal order, overruling a motion to dismiss a bill for want of equity, this court will of its own motion dismiss the appeal, unless the record shows that the consent of the opposite party or his attorney was obtained before the taking of the appeal.—*Morgan v. Jones.*..... 250
6. *Same.*—An appeal taken during the session of the court, after the commencement of the term, which is made returnable to the then pending term, will be dismissed on motion of appellees.—*Rodgers v. Abercrombie.*..... 466

II. TIME AND MANNER OF TAKING APPEAL, AND HEREIN OF AFFIRMANCE ON CERTIFICATE.

7. *Appeal to supreme court; to what term returnable.*—An appeal to the supreme court should be made returnable to the next ensuing term of the supreme court, after the appeal is perfected by the giving of security for costs of the appeal as required by the statute.—*Rodgers v. Abercrombie.*..... 466
8. *Same.*—The law determines to what term of the supreme court an appeal is to be returned, and not the certificate of the clerk.—*Shulman, Goetter & Weil v. Brantley & Copeland.*..... 193
9. *Same; to what term appeals must be made returnable.*—The appeal is to be made returnable to the next term of the supreme court after it is taken; and such should be the citation in error served upon the opposite party.—Rev. Code, § 3488, 3492.—S. C.
10. *Appeal, clerk's certificate of; what should show.*—The clerk's certificate of appeal should show that an appeal has been taken, and when it was taken; if it goes beyond this, it is surplusage.—Rev. Code, § 3485, 3509; Sup. Court Rules, No. 22.—S. C.
11. *Judgment; when not affirmed on certificate.*—The judgment of the court below will not be affirmed on certificate, when it appears that the date of taking the appeal, as shown by the certificate, is subsequent to the term of court at which the motion of affirmance is made.—S. C.

ERROR AND APPEAL—CONTINUED.

12. *Same; practice as to.*—In such case, the cause will be permitted to be docketed, but it will not stand for trial until the next succeeding term of the court.—Rev. Code, § 3498.—*S. C.*
13. *Cases modified and limited.*—*Cowles v. Frear*, 43 Ala. 642; and *Willingham v. Harrell*, 34 Ala. 680; modified and explained, as to appeals.—*S. C.*
14. *Judgment; when may be affirmed on certificate.*—In appeals to the supreme court, the statute requires that the transcript shall be filed within the three first days of the court to which the appeal is taken. If this is not done the judgment may be affirmed on certificate.—Rev. Code, § 3499.—*Jones v. Matthews*..... 559
15. *Same; when may be set aside.*—And if such judgment is affirmed on certificate, the court may set the affirmance aside and reinstate the case, for good cause shown. But the motion for this purpose must be made during the term, and supported by affidavits showing satisfactory reasons why the transcript was not filed *within the three first days* after the call of the division to which the case belongs.—Rev. Code, p. 818, Rule 26.—*S. C.*
16. *Same; when judgment of affirmance on certificate will not be set aside.*—If the affidavits submitted with the motion show that the transcript was made ready by the clerk of the court below, as early as the commencement of the term of this court to which the appeal is taken, and that the cause belongs to the third division, which by order of court was set to be called on Monday, the 5th day of February after the commencement of the court on the first Monday in January in the same year, and the judgment of affirmance is taken on certificate, on the 10th day of said month of February,—then the failure to file the transcript, because the same was not sooner furnished by the clerk than the commencement of the term, is not a satisfactory reason to set the judgment of affirmance aside. Such delay is not a compliance with the rule of practice prescribed by this court.

PRACTICE.

17. *Bankruptcy of party after appeal to supreme court; when not sufficient ground to set aside judgment.*—If a party becomes bankrupt after the submission of a cause in the supreme court, the judgment will not be set aside, but will be rendered as of the date of the submission.—*Booker v. Adkins*..... 529
18. *Same; what not sufficient evidence of bankruptcy, &c.*—A mere suggestion, on information and belief, by the appellant, that the appellee has become bankrupt since the appeal, but before judgment rendered in this court affirming the judgment of the court below, will not authorize any action by the supreme court.—*S. C.*
19. *Presumptions in favor of judgment below.*—The evidence must be confined to the issue or issues made on the trial; and when the record fails to show what issue was joined between the parties, it will not

ERROR AND APPEAL—CONTINUED.

- be presumed that there was an issue which forbid the exclusion of testimony apparently irrelevant.—*Hill v. Smith*..... 563
20. *Same*.—The charges of the court must be confined to the issues and the evidence before the jury on the trial; and where the record fails to show what the issues were, and all the testimony is set out in the bill of exceptions, this court will not presume that there was not an issue to which the charges were applicable, if the evidence tends to support the charges, when the appellant comes here to set aside a non-suit taken in the court below.—*S. C.*
21. *Error; when not cause of reversal*.—Where the record shows that upon the case made on the trial below the plaintiff is not entitled to recover, a reversal will not be allowed though error may have intervened in the proceedings in the court below.—*Wilson v. Bozeman*.. 7
22. *Practice as to writs, in exercise of jurisdiction over inferior tribunals, &c.*—The appellate jurisdiction of this court is exercised under such restrictions, not repugnant to the constitution, as may from time to time be prescribed by law; but the legislature has no power to prescribe the mode or manner in which it must exercise its power to issue writs of injunction, *mandamus*, *habeas corpus*, *quo warranto*, and such other remedial and original writs as may be necessary to give it “a general superintendence and control of inferior jurisdictions.” It is the duty of this court, to enable it to carry out the powers with which the constitution has invested it, of exercising “a general superintendence and control of inferior jurisdictions,” to adopt such course of proceeding as will make its control complete,—*Ex parte Candee*..... 389
23. *Rehearing*.—Under the circumstances of this case, a *certiorari* was allowed to bring up matter of record to show jurisdiction of this court to entertain the appeal, and in support of the motion to set aside order of dismissal.—*Morgan v. Jones*..... 250
24. *Cause submitted without argument or brief; when errors assigned will be considered abandoned*.—When a cause is submitted “by consent” without argument, and no brief is furnished the court by the appellant in support of the assignment of errors, it will be presumed that the assignment of errors is not insisted on, and this court will not feel bound to consider them.—*Dix & Wilkerson v. McDougal*..... 383

ESTATES OF DECEDENTS, AND HEREIN OF INSOLVENT ESTATES.

1. *Probate court; when obtains jurisdiction to order sale of decedent's lands for distribution*.—An application to the probate court by an executor or administrator of a deceased person to sell the lands of the estate for distribution is, essentially, a proceeding *in rem*, and when the court has acquired jurisdiction by a petition filed containing the jurisdictional facts, an order of sale will not be void for errors that may intervene in the after proceedings of the case.—*DeBardelaban v. Stoudenmire*..... 646

ESTATES OF DECEDENTS, &c.—CONTINUED.

2. *Void order of sale ; who may petition to have set aside.*—If, however, the petition is insufficient to give the court jurisdiction, the order of sale and a sale made under it will be void, and may be set aside and vacated in the court by which the order was made, on the application of any person or persons interested in, or prejudiced by, said order of sale.—*S. C.*
3. *Jurisdiction ; what construction will be put upon words used in petition, to uphold.*—The petition need not pursue accurately the language of the statute ; any words that necessarily convey to the mind all that the statute requires will be sufficient, and the words used should be construed liberally and favorably, to sustain the jurisdiction of the court and the validity of the order of sale.—*S. C.*
4. *County in which lands are situate ; what description of lands will support jurisdiction.*—If the petition omits, in words, to state that the lands are in the county, or within the jurisdiction of the court in which the application is made, yet, if such a description is given as to leave no real difficulty in identifying the lands intended, it will be sufficient, especially if no objection is interposed before the final order of sale is made.—*S. C.*
5. *Decedent, sale of lands of ; when order for not void.*—An executor's or administrator's sale of the lands of a decedent, under order of court, to pay debts, is not void, if it appears from the record of the proceedings on the application in the probate court for such order, that a proper application or petition made by such executor or administrator was filed in the proper court, and that the parties interested had proper notice of the application before the order was granted,—*Rev. Code, § 2222; 41 Ala. 26, 39.—Spragins v. Taylor. 520*
6. *Same ; jurisdiction of probate court to order sale ; when attaches.*—The filing of the application or petition for the order of sale by the executor or administrator, containing the proper allegations, and descriptions of the land and parties, as required by the Code, gives the court jurisdiction to hear and determine the case by order or decree.—*S. C.*
7. *Same ; effect of irregularities after jurisdiction attached.*—And whatever irregularities may intervene after jurisdiction attaches by filing the application for sale, are but errors, and they do not render the judgment of the court void for want of jurisdiction ; unless it is shown that there has been some neglect of a statutory requirement, which declares the proceeding void on that ground.—*Rev. Code, § 2225.—S. C.*
8. *Same.*—The facts, that the petition or application is signed in the name of the petitioner "by his attorney;" that the petition or application is not verified on oath; that no guardian *ad litem* was appointed for the minors interested in the estate to be sold before the hearing, or that the report of the sale was not verified by the oath of the petitioner, do not render the sale void or defeat the jurisdiction of

ESTATES OF DECEDENTS, &c.—CONTINUED.

- the court. These are but irregularities or errors which do not render the judgment or order of the court a nullity.—*S. C.*
9. *Revised Code, § 2221; what allegation equivalent to the word "equitably" used therein.*—An allegation in a petition to the probate court for an order to sell the land of a decedent under section 2221 of Revised Code, that the same can not be "fairly" divided, &c., is equivalent to saying that it can not be "equitably" done.—*Warnock v. Thomas et al.* 463
 10. *Decree; for what reason, not void.*—A decree for the sale of the land of a decedent, and of confirmation of such sale, are not void because rendered by a probate court of the late insurrectionary State government. 463
 11. *When has not jurisdiction to decree money value of support allowed by will, &c.*—A distributee was entitled to support out of an estate, free of charge during the time it was kept together, but did not receive it,—*Held*, that on settlement by the executor, the probate court had no jurisdiction to ascertain its money value, and decree the amount to her in the distribution.—*Montgomery, Ex'or, v. Bowen.* 353
 12. *Exempt property of decedent; what, child may claim.*—If a person die, in this State, and leave no widow, and but a single child, who is his sole and only heir and distributee, five hundred dollars worth of the land of the deceased is exempt from the payment of such decedent's debts, for the child's use.—*Hudson v. Stewart.* 204
 13. *Same; rights of child when estate is insolvent.*—And when the estate is insolvent, and it becomes necessary to sell the estate for the payment of debts, the land so exempt should be laid off and set apart for such child, in the manner required by the statute. And if the the land can not be divided, it must be sold, subject to this claim of exemption.—*Revised Code, § 2061, Cl. 6. S. C.*
 14. *Same.*—And if, when the land is so offered for sale, it fails to sell for five hundred dollars, the sale should not be confirmed, as the child is entitled to the five hundred dollars or the land.—*S. C.*
 15. *Same; proof of insolvency of estate; what competent evidence to prove.*—On an application by petition, in favor of such child, it is not necessary, in order to show the insolvency of the estate, that there shall be a judgment of insolvency in the probate court, but it is enough, "when the estate is ascertained to be insolvent, upon evidence satisfactory to the probate judge."—*Revised Code, § 3539, G. p. 671. S. C.*
 16. *Same.*—On such an issue of insolvency, *vel non*, the evidence of the administrator is competent, without a judgment of insolvency, and it should not be rejected.—*S. C.*
 17. *Same; petition of child should not be dismissed for irregularities, &c.*—When the petitioner is a female and a minor, her petition should not be dismissed for any irregularity or informality, which would be amendable. The court should direct the petition to be properly amended, if it was deemed insufficient. Its dismissal is to be looked upon with grave disfavor, in such a case.—*S. C.*

ESTATES OF DECEDENTS, &C.—CONTINUED.

18. *Insolvency, decree of; what does not annul.*—The omission of creditors to file their claims against an estate duly declared insolvent, can not annul the decree of insolvency.—*McCuan v. Turrentine*. 69
19. *Dower, claim of by widow; does not destroy right to claim five hundred dollars out of insolvent estate.*—A claim of dower by the widow does not deprive her and the minor children of her husband of the homestead exemption of \$500 worth of land out of his insolvent estate.—*S. C.*
20. *Homestead exemption; what does not deprive widow of.*—An administrator, shortly after the death of the intestate, obtained an order for the sale of his lands for the payment of debts, sold them, and had the sale confirmed. Afterwards, but before the payment of the purchase-money, he reported the estate insolvent. A conveyance was subsequently made to the purchaser, and on the final settlement of the insolvent estate a balance was distributed to the heirs, because of the omission of the creditors to file their claims.—*Held*, that the widow and children were not thereby deprived of their homestead exemption of \$500 worth of land.—*S. C.*
21. *Claim; what not such as required to be presented within nine months of declaration of insolvency, &c.*—A promissory note, upon which a suit is pending at the time an estate is declared insolvent, is not such a suit as is required to be verified by affidavit and filed against such estate within nine months after the declaration of insolvency. Such suit, on revival, may proceed to judgment, and the judgment may be certified and filed as required by the statute. An objection by plea in abatement for a failure to file such note before judgment, is not sufficient to abate the suit.—*Waller, Adm'r, v. Nelson*. 531
22. *Revival of suit; within what time may be made.*—A motion to revive a suit pending in court, after the death of the plaintiff or defendant, comes in time, if made within eighteen months after the death of the plaintiff or defendant, or within eighteen months after the death or removal of the personal representative, when the first representative died before revival in his name. The mere suggestion of the death of the deceased party upon record is sufficient motion for this purpose, in order to remove the bar of the statute.—Revised Code, § 2542; 35 Ala. 79. *S. C.*

See JUDGMENTS AND DECREES, 12.

EVIDENCE.

I. ADMISSIBILITY AND RELEVANCY.

1. *Indictment, original of; when admissible evidence.*—In an action of damages for causing the plaintiff to be indicted for perjury, the original indictment is receivable in evidence unless it appears that the final record has been completed.—*Watts v. Olegg*. 561
2. *Same; how may be authenticated.*—It may be authenticated by the verbal testimony of the clerk.—*S. C.*
3. *Judgment of acquittal; effect of.*—In such a case, the minute entry of

EVIDENCE—CONTINUED.

the judgment of acquittal in the prosecution for perjury is not *res inter alios acta*.—*S. C.*

4. *Declaration made by persons leaping from car to avoid injury; when and for what purpose admissible.*—The plaintiff having received his injuries by leaping from the car, while others who remained inside were not hurt, it is proper for him to prove that others besides himself did the same, and also their declarations at the time of their reasons for so doing, to show the reasonableness of his conduct and to avoid the charge of contributory negligence.—*M. & M. R. R. Co. v. Ashcraft*. 16
5. *Running off of train consecutively before accident; when legitimate evidence.*—In an action by a passenger to recover damages for personal injuries occasioned by a run-off, evidence that the train on which the accident occurred and of which witness was conductor, had run off the track seven or eight times within a month before the accident, is admissible.—*S. C.*
6. *Insolvency of decedent's estate; what competent evidence of.*—On petition by a child for the exemption provided for by clause 6 of section 2961 in case of insolvency, it is not necessary, in order to show the insolvency of the estate, that there shall be a judgment of insolvency in the probate court, but it is enough, "when the estate is ascertained to be insolvent, upon evidence satisfactory to the probate judge."—Revised Code, § 3539, G. p. 671. *Hudson v. Stewart*. 204
7. *Same.*—On such an issue of insolvency, *vel non*, the evidence of the administrator is competent, without a judgment of insolvency, and it should not be rejected.—*S. C.*
8. *Original undertaking, &c.; what evidence inadmissible.*—Where money is advanced to A, on the request of B, if the party by whom the money is advanced directs his clerk, in making the entry on his books against A, to enter opposite the name of A, "B responsible," and B, in an action against him for the money, pleads the statute of frauds, the plaintiff can not introduce such direction and entry as evidence in his own behalf.—*Morse v. Bell, Moore & Co.* 498
9. *Declaration of conductor of rail road train; for what purpose inadmissible.*—In an action for damages against a rail road company for injuries to the person, declarations made by the conductor of the train to a passenger, a moment before the accident, of the bad condition of the road and his train having run off the track five consecutive times next preceding the present trip, are not admissible in proof of negligence, either as *res gestæ*, or as admissions of an agent binding on the principal.—*M. & M. R. R. Co. v. Ashcraft*. 16
10. *Evidence of payment by executrix on debt of testator; when competent.*—Evidence of partial payments by an executor upon a note made by his testator, is competent to show an admission on the part of the executor that the claim had been duly presented.—*Taylor, Ex'r, v. Perry*. 24
11. *Same; evidence of wealth or poverty of plaintiff or defendant irrelevant;*

EVIDENCE—CONTINUED.

evidence of disabling effect of injury is material.—In an action against the county, to recover damages on account of injuries inflicted by a fall from a bridge built by contract with the commissioners court, the jury can not look to the wealth or poverty of the county or of the plaintiff, in making up the amount of their verdict. But they may consider the disabling effects of the injuries, whether past or prospective.—*S. C.*

II. CHARGE—UPON EFFECT OF.

12. *Charge to jury ; what erroneous.*—A charge that requires the court to determine what the evidence proves, should be refused. Admitting the evidence to be true, it is the province of the jury, and not of the court, to find or determine what it proves.—*Marx v. Bell, Moore & Co.*..... 497
13. *Same.*—A charge which assumes the truth of evidence, and withdraws the consideration of its credibility from the jury and instructs them that they must find for the defendant, is an invasion of the province of the jury, and necessarily erroneous.—*David v. Malone*... 428

III. NOTICE TO PRODUCE.

14. *Notice to produce demand in writing ; when not sufficient.*—In unlawful detainer, a notice, to produce the written demand, given by the plaintiff to the defendant's counsel at the trial, is not sufficient in point of time, without proof that the paper is in court, or so near that it can be obtained without delaying the trial. There is no presumption that the defendant or his counsel has it in court.—*Bates v. Ridgway* 611

IV. MATTERS JUDICIALLY NOTICED.

15. *Journals of two houses of general assembly ; courts will take judicial notice of, for purpose of ascertaining whether a law was passed in accordance with constitution.*—The journals of the two houses of the general assembly are public records, of which the courts will take judicial notice, and if it appears from said journals that an act was not passed according to the forms of the Constitution, it will be declared not to have the force of law.—*Miller v. State*..... 115

V. PAROL AND WRITTEN.

16. *Parol evidence, in aid of memorandum of sale, &c., under § 1863, Revised Code ; what not admissible.*—Where the recitals of the written memorandum of a sale of land, are not sufficient to take sale from without the influence of the statute of frauds, parol evidence can not be let in to cure the defects of the memorandum.—*Carroll v. Powell, Executor*..... 298
17. *Parol evidence, when admissible ; in aid of indenture of apprenticeship.*—On the trial of an indictment, under section 3690 Revised Code, for enticing, decoying or persuading an apprentice to leave the service or employment of his master, if an indenture of appren-

EVIDENCE—CONTINUED.

tieship is offered by the State, to prove that the person charged to have been enticed, &c., was an apprentice, and the name in the indictment is George Blair, and in the indenture he is called a certain boy, named George, this is not a variance, but a defective description that may be aided by parol proof.—*Owen v. State*..... 328

VI. PRIMARY AND SECONDARY.

16. *Contents of letter; when secondary, evidence of, improper.*—Where a letter of one of the parties becomes important evidence on the trial of a cause, if objected to, its contents ought not to be proved, by the oral evidence of a witness, unless it be first shown that the letter itself can not be had, or is lost or destroyed.—*Bogan v. McCutchen*. . . 493
17. *Same; what must be proved as to possession of.*—If it be doubtful whether it be in the possession of the person to whom it was addressed, or of the party who wishes to use its contents as evidence, it must be shown that after due diligence has been used, it can not be found in the possession of either.—*S. C.*
18. *Secondary evidence; what necessary to authorize admission of.*—What the law requires, before secondary evidence can be given of the contents of a paper, supposed to be lost or destroyed, is, in the language of 1 Greenl. Ev. § 558, “a *bona fide* and diligent search,” that will enable a party to testify that it can not be found, and that he honestly believes it to be either lost or destroyed. If the paper was supposed to be of little value, a less degree of diligence will be demanded, as it will be aided by the presumption of loss which this circumstance affords.—*S. C.*
19. *Person in whose custody lost paper belonged, must generally be called to account for loss of.*—If it belonged to the custody of a certain person, or may be presumed to have been in his possession, he must, in general, be called and sworn to account for it, if he is within the reach of the process of the court; and so, if it might or ought to have been deposited in a public office, or other particular place, that office or place must be searched.—*S. C.*
20. *Secondary evidence of lost instrument required to be stamped; when admissible.*—Where a contract requires a United States revenue stamp, it may be affixed and cancelled by any of the parties. If this is not done at the date of its execution, the instrument can not be received in evidence, and though lost, secondary evidence of its contents can not be admitted. The omission must be supplied in the manner provided by the revenue law.—*Turner v. State*..... 549
21. *Unlawful detainer; secondary evidence of demand in writing, when inadmissible.*—In an action of unlawful detainer, secondary evidence of the demand in writing can not be received until the proper predicate has been laid for its introduction.—*Bates, Administrator, v. Ridgway* 611

EVIDENCE—CONTINUED.

VII. RECORDS AND JUDGMENTS.

22. *What may be substituted under act approved Jan. 18th, 1866.*—The lost records of deeds and other proceedings of the courts in this State, made during the late war, may be established and substituted under the act of the general assembly, entitled "an act to authorize the substitution of lost records of judgments, and decrees of courts, and other records," approved January 18, 1866.—(Pamph. Acts 1865, 1866, p. 48, Act No. 18.)—*Smith et al. v. Ivey*..... 48
23. *Judgment nil dicit in trover; conclusiveness of.*—In ascertaining the damages to which the plaintiff is entitled, after judgment by default or *nil dicit* in trover, evidence which can only mitigate the damages by subverting the judgment, is inadmissible.—*Gurry v. Wilson*.... 638
24. *Judgment of acquittal of defendant, effect of as evidence in action on the case by defendant against prosecutor for causing indictment.*—In an action of damages for causing the plaintiff to be indicted for perjury, the minute entry of the judgment of acquittal in the prosecution for perjury, is not *res inter alios acta*.—*Watts v. Clegg*..... 561
25. *Decree of court held during rebellion; when collection of, will be enforced in present State courts.*—Mrs. F. and her husband, on the 17th day of June, 1861, obtained a decree in a chancery court, held under the rebel authority, in the county of Greene, in this State, for the use of Mrs. F., as her separate estate, under the will of her father, made in 1838, against O., sheriff, for an improper levy and sale of her property, for \$5,227.48. On this decree execution was issued, and returned "no property found" against O., who was insolvent,—*Held*, that a court of chancery will entertain jurisdiction to enforce the collection of said decree, in the name of the husband and wife in a proper case, as for her separate estate at common law, when the marriage was before our statute upon the separate estate of wife.—*Kirksey v. Friend*..... 276
26. As to effect of judgments rendered in Confederate courts, and what will not be disturbed by courts of present State government—

See *Wise v. Norton*, 214—2d and 3rd Head-notes.

For evidence relating exclusively to CRIMINAL LAW, see that title.

EXECUTION.

1. *What must be alleged as to, to maintain creditors bill under § 3442, Rev. Code.*—A bill filed under the provisions of section 3442 of the Revised Code, by a judgment creditor whose execution is not satisfied, to subject to its payment property held in trust for his debtor, is wanting in equity unless it alleges a return of "no property," or a partial satisfaction only.—*Mixon v. Dunklin*..... 455
2. *Supersedeas of; by what court issued and where returnable.*—A proceeding by *supersedeas* is in the nature of an *audita querela*, and, as such, should be granted out of the court where the record, upon which it

EXECUTION—CONTINUED.

- is founded, remains, or be returnable in the same court.—*Payne v. Thompson*..... 535
3. *From probate court against sureties of administrator; what necessary to authorize issue of.*—An execution from the probate court is improperly issued against the sureties of an administrator, without a return of “no property” against the administrator, made to a regular term.—*S. C.*
4. *Same; rule where sheriff is ex-officio administrator.*—The sheriff’s official bond becomes an administration bond when the administration of an estate is committed to him *ex-officio*, and his sureties are liable to an execution for his default, without a previous suit on the bond, as other sureties of administrators.—*S. C.*
5. *Judgment on which execution has not issued; what has preference over, &c.* A deed of trust for valuable consideration, duly recorded, supersedes a judgment previously rendered, but on which no execution had issued at the date of the deed after the lapse of a term.—*Whitfield et al. v. Clark*..... 555
6. *What destroys lien of execution.*—The lapse of a term destroys the lien, obtained by an execution in the hands of the sheriff at the death of the defendant, and prevents the issue of a subsequent alias.—*S. C.*
7. *Sale of land under execution; when will be enjoined at instance of mortgage.*—Equity will enjoin a sale of land under a judgment and execution to which it is not subject, at the suit of a mortgagee or trustee in a deed of trust.—*S. C.*
8. *What not satisfaction of.*—A mere levy of an execution upon property sufficient to satisfy it, is not a satisfaction of the judgment.—*Summerhill v. Trapp*..... 363
9. *Supersedes of execution, &c.*—A petition praying to have an execution quashed, should be accompanied by a copy of the execution, or otherwise contain an accurate description of it. Without this the petition is bad for uncertainty.—*S. C.*

EXECUTORS AND ADMINISTRATORS.

1. *Executrix, action against; what amendment permissible.*—Where the action is against an executrix, and the complaint is on a note made by her, as executrix, to which a demurrer is filed, because it does not show any cause of action against her, as executrix, the complaint may be amended by adding counts, stating an indebtedness by testator, in his life-time, and striking out the count on the note described in the original complaint.—*Taylor v. Perry*..... 240
2. *Same; interest, payment of by, on note of testator; when removes bar of statute of limitations and equivalent to presentation.*—Payments of interest by an executor or administrator on a note, made by the testator or intestate, in his life-time, before the bar of the statute of limitations is complete, are partial payments under § 2914, Revised Code, and will remove the bar to the suit, which, without such payments, would be a good defense to the action. Such payments are, also, an

EXECUTORS AND ADMINISTRATORS—CONTINUED.

admission, on the part of the executor or administrator, that the claim had been duly presented.—*S. C.*

3. *Same; promissory note given by, for debt of testator; effect of.*—A promissory note given by an executor or administrator, for a debt of the testator or intestate, is neither a payment nor an extinguishment of such debt. At most, it only suspends the right of action on the original debt, until the maturity of such note. The transfer of such a note by delivery, operates to pass to the holder the real interest in the original debt, and, under § 2523, Revised Code, authorizes and requires him to sue for its recovery in his own name.—*S. C.*
4. *Payments of interest on new note; effect of, on original debt.*—Payments of interest on such a note, are, in legal effect, partial payments upon the original debt, and preserve it from the influence of the statute of limitations.—*S. C.*
5. *Executor; when entitled to compensation outside of commissions on receipts and disbursements.*—Where the will requires the widow, as executrix, to keep the estate together, and “to work it,” as though the testator were alive, she is entitled to reasonable compensation for doing so, independent of commissions for receipts and disbursements. Although such compensation may not, strictly speaking, be a preferred claim, yet it is to be paid before the ordinary debts of the testator, in case of insolvency.—*Waller, Adm’r, v. Ray et al.* 498
6. *Executor; when should not be charged with promissory note not collected by him.*—An executor should not be charged with the amount of promissory notes payable to his testator, because they remain in his hands uncollected, when it is shown that the maker claimed a larger amount against the estate on a contract with the testator for work to be done, which was done, and that an attorney, whom the will requested should be consulted on such matters, advised against suing on the notes.—*Bowen et al., Ex’rs, v. Montgomery, Ex’r.* 357
7. *Executor; what currency was not bound to apply to his own compensation during late war.*—An executor during the late war was not obliged to appropriate Confederate currency, received from the sale of crops and other products, in satisfaction of his services to the estate. If he improperly disposed of the property, he ought to have been charged with waste.—*S. C.*
8. *Executor; what sale by, within statute of frauds.*—A sale of lands at auction, by one claiming to sell as executor, under a power in the will of his testator, is within the statute of frauds.—*Carroll v. Powell.* 298
9. *Same; what not sufficient written memorandum under section 1863 of the Revised Code to take sale out of statute of frauds.*—A written memorandum of such a sale, in the words and figures following, to-wit: “Sale bill of the estate of John Anderson, deceased, March 14th, 1868. 80 acres of land, east half of the southeast quarter of section twenty-four, township eleven, range six, bought by A. Carroll, at \$400,” is not a sufficient memorandum under section 1683 of the Revised Code, to take the sale out of the statute of frauds.—*S. C.*

EXECUTORS AND ADMINISTRATORS—CONTINUED.

10. *Executor; when not chargeable with rent for which security was not taken.*—Where an executrix was authorized by the will of the testator “to work the place” as if the testator were alive, and invested with a large discretion as to the management and conduct of the estate, she will not be liable, notwithstanding section 2706 of the Revised Code, to account for rent of lands for which she took no other security than the note of the lessees, who were then reputed solvent, but afterwards became insolvent, whereby she failed to collect the rent. *Waller, Adm’r, v. Ray et al.* 468
11. *Administrator; what settlement by, final and not liable to collateral impeachment.*—When an executor or administrator resigns, and makes the settlement required by section 2232 of the Revised Code, such settlement is to be regarded as the final settlement of the out-going executor or administrator, and it can not be collaterally impeached, in the subsequent administration of the estate.—*S. C.*
12. *Same; duty of probate court in such settlement.*—On such settlement, it is the duty of the court to examine and audit the account of the out-going executor or administrator, and to require him to produce satisfactory evidence of the correctness of each item on the credit side of the account, whether exceptions be or be not filed to the same.—*S. C.*
13. *Same; who are proper parties on such settlement.*—The parties to such a settlement are the heirs-at-law of the deceased, and the legatees or distributees, as the case may be, the administrator *de bonis non* of the testator or intestate, and, if the estate has been declared insolvent, the creditors are also proper parties.—*S. C.*
14. *Administrator de bonis non; when not chargeable with items improperly allowed, &c., on final settlement of administrator in chief.*—Where the administrator *de bonis non* appears on such settlement, and examines the accounts, and, without filing exceptions, consents that the same may be allowed, this is not sufficient, on any subsequent settlement, to charge him with negligence, unless it clearly appears that said account, or items in it, were improper and should have been disallowed, and that he omitted to file exceptions from motives of bad faith.—*S. C.*
15. *Exceptions to account of administrator of insolvent estate; when must be final, &c.*—Where the administrator of an insolvent estate files his accounts for a distribution among the creditors, no exceptions can then be made that might have been made at any previous settlement, or when the estate was declared insolvent.—*S. C.*
16. *Objection to voucher; what properly overruled.*—The supreme court can not say there was error in overruling an objection to an entire voucher, part only of which was proved.—*Bowen et al. v. Montgomery.* 351
17. *Release of purchaser from bid, by administrator.*—If an administrator, at a public sale of the personal property of the estate, agree to release a purchaser from his bid, it is immaterial so far as the purchaser is concerned whether he intended thereby to take the property

EXECUTORS AND ADMINISTRATORS—CONTINUED.

as his own, or to hold it as the property of the child. In either case, he can not afterwards repudiate his agreement, and resell the property for a less sum and charge the first purchaser with the difference. *Reynolds v. Dismuke*..... 210

EXEMPT PROPERTY.

1. *Homestead exemption; what does not deprive widow of.*—An administrator, shortly after the death of the intestate, obtained an order for the sale of his lands for the payment of debts, sold them, and had the sale confirmed. Afterwards, but before the payment of the purchase-money, he reported the estate insolvent. A conveyance was subsequently made to the purchaser, and on the final settlement of the insolvent estate a balance was distributed to the heirs, because of the omission of the creditors to file their claims,—*Held*, that the widow and children were not thereby deprived of their homestead exemption of five hundred dollars worth of land.—*McCuan v. Turrentine, Adm'r*..... 67
2. *Same; language in mortgage, what not held to apply to.*—A mortgage of lands which conveys the property generally, and in the conditional part empowers the mortgagee “to take possession of said property, reserving alone the amount of land which the law exempts as a homestead,” and the same sell, &c., does not convey the homestead nor authorize a decree of foreclosure against it.—*Ray v. Wragg*.... 52
3. *Same; how set apart.*—The quantity and value of the land to be set apart should be ascertained from sections 2880 and 2884 of Revised Code, notwithstanding the mortgagor had become bankrupt, and had purchased the property, subject to the mortgage at sale by his assignee in bankruptcy.—*S. C.*
4. *Exempt property of decedent; what, child may claim.*—If a person die, in this State, and leave no widow, and but a single child, who is his sole and only heir and distributee, five hundred dollars worth of the land of the deceased is exempt from the payment of such decedent's debts, for the child's use.—*Hudson v. Stewart*..... 204
5. *Same; rights of child when estate is insolvent.*—And when the estate is insolvent, and it becomes necessary to sell the real estate for the payment of debts, the land so exempt should be laid off and set apart for such child, in the manner required by the statute. And if the land can not be divided, it must be sold, subject to this claim of exemption.—*Rev. Code, § 3061, cl. 6.—S. C.*
6. *Same.*—And if, when the land is so offered for sale, it fails to sell for five hundred dollars, the sale should not be confirmed, as the child is entitled to the five hundred dollars or the land.—*S. C.*

FACTOR.

1. *Factor, to whom goods are consigned for sale; to what commissions entitled, and what lien has.*—As a general rule, in the absence of any

FACTOR—CONTINUED.

agreement to the contrary, a factor, to whom goods are consigned for sale, is entitled to a commission as such only on the amount of the goods sold, and has a lien upon the goods in his possession, and upon the price of such as may have been sold, not only for his commissions but also for advances, and for disbursements made to preserve the property and all other necessary expenses and charges that are certain, and not sounding in damages merely.—*Sawyer and Bouillet v. Lorillard*.....

335

2. *Same, lien of; how may be impaired or lost.*—Such liens may be lost by the voluntary parting with the possession by the factor, or they may be waived by any contract or agreement, by which said liens are surrendered, or become inapplicable—as, for example, if he agrees to deliver the property to, or to hold the same as the property of, a third person.—*S. C.*
3. *Principles of law enunciated; applied to case at bar.*—H. and L. N. & Co. purchased a quantity of tobacco from P. & G. L. of New York, and shipped it, in the name of L. N. & Co., to S. & B., factors, at Mobile, Ala., for sale on commission. Afterwards L. N. & Co. and H. disclosed to S. & B. the interest of H. in the tobacco, and informed them that it had been purchased of P. & G. L. on time, and that H. and L. N. & Co. were unable to pay at maturity notes given for the tobacco, and desired to re-transfer it to P. & G. L., and with that view desired a bill of charges on the tobacco in order that P. & G. L. might know exactly what burdens it was subject to. Thereupon S. & B. gave H. and L. N. & Co. a receipt, stating, in substance, that S. & B. had received the tobacco on account of H. and L. N. & Co., and that it “would be delivered on return of the receipt endorsed by them, and payment of charges and commissions incurred thereon.” At the same time S. & B. made out and delivered to H. and L. N. & Co. an itemized bill of the charges, &c., upon the tobacco. H. went to New York, and with the consent of L. N. & Co., transferred the tobacco, and duly endorsed the receipt to P. & G. L., and gave them the bill of charges. P. & G. L. immediately notified S. & B. by telegraph and by letter, and shortly afterwards sent an agent to get possession of the tobacco, who tendered the receipt duly endorsed, paid the bill of charges, and demanded the tobacco. S. & B. refused to deliver, on the ground that they had a lien on the tobacco for commissions, &c., other than those stated in the itemized bill,—*Held*, 1st. That the receipt must be construed in connection with the itemized bill of charges and the proof showing the reasons why both were given; 2d. That thus construed the receipt amounted to an agreement on the part of S. & B. to deliver the tobacco to P. & G. L., if it should be re-transferred to them, upon payment of the charges in the itemized bill and the return of the receipt, duly endorsed, within a reasonable time; 3d. That the receipt was a waiver by S. & B. in favor of P. & G. L. of any lien S. & B. may then have had on the tobacco for commissions or charges not contained in the itemized bill.

FRAUD.

1. *Fraud; what badge of, but not conclusive of.*—The owner of property, although insolvent and largely indebted, may make a fair sale of property to a relation, if the sale be made without fraud. These circumstances, though badges of fraud, are not conclusive proof of it.—*Harkins et al. v. Bailey*..... 376
2. *Fraud; to what equity will look in determining.*—Equity will not only regard the nature of the bargain, but also the sex and circumstances of the parties to it, when the controversy involves a question of fraud. A widow woman in feeble health, with a family of children in helpless poverty, will not be treated as the equal in a business transaction with a well informed, influential and prosperous merchant.—*Balkum v. Breare*..... 75

FRAUDS, STATUTE OF.

1. *Statute of frauds; what sale within.*—A sale of lands at public auction, by one claiming to sell as executor, under a power in the will of his testator, is within the statute of frauds.—*Carroll v. Powell* 298
2. *Same; what not sufficient written memorandum under section 1863 of the Revised Code to take sale out of statute of frauds.*—A written memorandum of such a sale in the words and figures following, to-wit: "Sale bill of the estate of John Anderson, deceased, March 14th, 1868. 80 acres of land, east half of the southeast quarter of section twenty-four, township eleven, range six, bought by A. Carroll, at \$400," is not a sufficient memorandum under section 1863 of the Revised Code, to take the sale out of the statute of frauds.—*S. C.*
3. *Same; defects of memorandum, how can not be cured.*—The defects of such a memorandum can not be cured by oral evidence.—*S. C.*
4. *Same; plea of statute of frauds; what replication to, bad.*—A replication to a plea of the statute of frauds, that the defendant went into the possession of the lands under the contract of sale, and continued to hold the possession up to, and at the commencement of the suit, claiming to own the same, under and by virtue of said contract, is bad on demurrer.—*S. C.*
5. *Original undertaking; what is, and not within statute of frauds.*—Where money is advanced to A. on the request of B., if the credit is wholly and exclusively given to B., his liability is an original, and not a collateral liability, and so, not within the statute of frauds.—*Marx v. Bell, Moore & Co.*..... 498
6. *Same; what evidence inadmissible to prove nature of undertaking.*—Where money is advanced to A. on the request of B., if the party by whom the money is advanced directs his clerk, in making the entry on his books against A. to enter opposite the name of A. "B. responsible," and B. in an action against him for the money, pleads the statute of frauds, the plaintiff can not introduce such direction and entry as evidence in his own behalf.—*S. C.*

GUARDIAN AND WARD.

1. *Married female minor; rights of, as against guardian.*—On the marriage of a *minor female ward*, she may require her guardian to make final settlement of his guardianship of her estate, and deliver to her the property or moneys belonging to her found to be in his hands on such settlement.—Revised Code, § 2422. *Wise v. Norton*. 214
2. *Same; settlement in Confederate court, when will not be set aside.*—On her marriage, the husband and guardian may make final settlement of the guardianship of her estate in the probate court of the proper county, and if the settlement thus made is correct, and without fraud or mistake, it will not be set aside in chancery, though the settlement was made in a rebel court of probate.—*S. C.*
3. *Voluntary accounting and settlement made in rebel court; when will not be disturbed.*—And after such accounting and settlement in a rebel court, the guardian may pay over to the wife and husband the balance found to be remaining in his hands on such settlement, and take the receipt of the wife and husband for the same, and such receipt will protect him against a second accounting on a bill filed by the wife against him and her husband, in chancery.—Revised Code, §§ 2422, 2685. *S. C.*
4. *Same; what husband and wife may receive, &c.*—And if the husband and wife, after such settlement with the guardian in a rebel court, receive from the guardian a promissory note in payment of the balance due her, instead of money, and the note is collected and used by the wife and husband, she will be held in chancery to have elected to take the note in lieu of money, and will be bound to her election.—*S. C.*
5. *Guardian appointed during war can not maintain suit in present State courts.*—A guardian appointed by the probate court of the rebel government having military control of this State in 1863, can not maintain an action as such guardian in the courts of this State, without a renewal of his appointment by the court of probate of the rightful State government.—*Troy v. Ellerbee*. 624

GUARANTY.

1. *What is original undertaking, and not a guaranty.*—Where money is advanced to A on the request of B, if the credit is wholly and exclusively given B, his liability is an original and not a collateral liability, and so not within the statute of frauds.—*Marx v. Bell, Moore & Co.*. 498

HOMESTEAD.

See EXEMPT PROPERTY.

HUSBAND AND WIFE.

1. *Married woman, owner of separate statutory estate; what power has as to collection of debts due her.*—A married woman, a citizen of this

HUSBAND AND WIFE—CONTINUED.

- State, who is the owner of a statutory separate estate, is clothed by law with the power to collect her debts, by suit or otherwise, and to "receive," with the concurrence of her husband, any property to which she may become entitled after her marriage.—Revised Code, §§ 2525, 2375, 2362. *Becton et al. v. Selleck*..... 226
2. *Same*.—In the exercise of this power, she acts without restraint, except that which may be imposed by her husband as her trustee. In collecting a debt or sum of money, to which she is entitled, she may take *land* in lieu of *money*. And in dividing the proceeds of a promissory note, in which her interest is one-fourth part, and the note is paid by a transfer of land, and the land is valued at more than her share, if she takes the land, she may pay the balance above her share in money, or bind herself by her own and her husband's promissory note for this balance, and secure the payment of the note thus given by mortgage on the land thus "received" in lieu of her part of the note thus collected; provided the note and mortgage are executed as required by the law governing the "separate estate of wife."—*S. C.*
 3. *Same*; when mortgage signed by married woman and her husband may be enforced against both.—Such mortgage may be foreclosed against the wife and her husband if she fails to pay the note when due, which has been thus entered into.—*S. C.*
 4. *Statutory separate estate*; what creates.—Where the wife with her own moneys purchased a tract of land, in this State, on the 5th day of January, 1852, and the deed is made to her "to have and to hold the above granted and described premises and appurtenances unto her, her heirs and assigns forever," this creates in her a separate estate, to be held under the Code of Alabama and the Revised Code of Alabama.—*Bowen v. Blount*..... 670
 5. *Same*; for what debt cannot be subjected.—The land thus held can not be sold under a decree on bill in equity for the payment of a promissory note given by the wife and her husband jointly, made by them since 1852, whether the debt so made is her debt or the debt of her husband, unless, perhaps, it was for "articles for the support and comfort of the household," under section 2376 of the Revised Code.—*S. C.*
 6. *Statutory separate estate*; what words of conveyance create.—A deed made August 12th, 1865, conveying to a married woman in the State lands situate here, "for her sole and separate use and benefit," creates in her a statutory separate estate, governed by all the restrictions and limitations contained in the Revised Code for the regulation of the "separate estate of the wife."—*Denechaud v. Berrey*..... 591
 7. *Same*; effect of words "for sole and separate use," &c.—The words, "for her sole and separate use and benefit," contained in such a deed, do not change the character of the estate which the married woman takes thereby. By force of the provisions of the Code, that would be the legal effect of the deed, although it contained no such words.—*S. C.*

HUSBAND AND WIFE—CONTINUED.

8. *Same; married woman can not mortgage, &c.*—An estate so created, is not subject to be encumbered by the wife's mortgage, as at common law, to secure her own or her husband's debt contracted after the Code went into effect.—*S. C.*
 9. *A mortgage by wife of separate statutory estate; when passes no title.*—A mortgage of the separate statutory estate of a married woman, executed by herself and her husband to secure the payment of their joint promissory note, vests no title in the mortgagee which will enable him to recover the possession from a subsequent vendee of the husband and wife, with or without notice. And the consideration of such note may be shown by parol proof to have been the individual indebtedness of the husband, no inconsistent consideration being expressed in the conveyance.—*Stribling v. Bank of Kentucky.* 457
 10. *Separate estate of wife; what are proper charges against, under section 2376 of Revised Code.*—Medicines, and the professional services of a physician, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, are proper charges against the separate estate of the wife under section 2376 of the Revised Code.—*May and Wife v. Smith et al.* 485
 11. *Same; what not proper charge against.*—The children of the husband by a former marriage are not such members of the household or family, when residing in it, as is contemplated by that section.—*S. C.*
 12. *Same; what causes of action can not be joined in proceeding to subject estate of wife under section 2376 of Revised Code.*—A cause of action against the husband only, can not be joined with an action prosecuted against the husband and wife jointly, for the purpose of enforcing a liability against her separate estate for articles of comfort and support of the family.—*S. C.*
- Quere.*—As to form of judgment in a suit against husband and wife for necessities.

INDICTMENT.

See CRIMINAL LAW.

INJUNCTION.

1. *Injunction; notice of motion to dissolve, what insufficient.*—Notice to complainants that application will be made to the chancellor in vacation to dissolve an injunction "at Lafayette, in Chambers county, Alabama, or at such place as said chancellor may be required to be by law," is void for uncertainty.—*Florence v. Paschal.* 458
2. *Injunction; when dissolved on unsworn answer.*—In an injunction bill, if the complainants waive the answers of the defendants being "made on oath," this does not impair the right of the defendants to have the injunction dissolved upon the denials of such unsworn an-

INJUNCTION—CONTINUED.

- swer, in like manner as if they were sworn.—*Lockhart et al. v. The City of Troy*..... 578
3. *Sale of land under execution; when will be enjoined at instance of mortgagee.*—Equity will enjoin a sale of land under a judgment and execution to which it is not subject, at the suit of a mortgagee or trustee in a deed of trust.—*Whitfield et al v. Clark et al*..... 555
4. *Election, holding of; when will not be enjoined on bill filed by individual electors.*—The holding of an election will not be enjoined, upon the allegation that the act under which it is to be held is unconstitutional, on a bill filed by individual electors in their own names, they not showing any injury or damage to themselves in person, property or rights.—*Jones v. Black*..... 540

INSOLVENT ESTATES.

See ESTATES OF DECEDENTS.

INTENT.

1. *Intention, with which act done; how proved.*—The intention with which an act is done, must be shown by what is said or done at the time, and not by proving an intention not then expressed.—*Reynolds v. Dismuke*..... 209

INTEREST.

1. *Interest, payment of on note of executor given for debt of testator; effect of on old debt.*—A promissory note given by an executor or administrator, for a debt of the testator or intestate, is neither a payment nor an extinguishment of a promissory note made by testator. At most, it only suspends the right of action on the original debt, until the maturity of such note. Payments of interest on such a note, are, in legal effect, partial payments upon the original debt, and preserve it from the influence of the statute of limitations.—*Taylor, Ex'r, v. Perry*..... 240
2. *What usurious interest.*—C., in 1866, sold land to N, for \$2,000 cash and twenty-three bales of cotton, weighing each five hundred pounds; the money was paid, N. was put into possession of the land, and the cotton was agreed to be delivered about the first of January following; but N. was only able to deliver twelve bales of the twenty-three when the cotton fell due; this left eleven bales unpaid. At the time of the payment of the twelve bales, the cotton was worth thirteen cents per pound; C. was then willing to "indulge" N. "in the payment" of said eleven bales yet "remaining unpaid;" and in order to do so, agreed with him to take a mortgage on his crop of that year, and postpone the payment of the eleven bales of cotton until some time in the year following, but on a second failure to pay the cotton N. was to account for it at thirty cents per pound. On a bill filed by C. against N. to foreclose his vendor's lien on the land

INTEREST—CONTINUED.

sold to N., C. is entitled to recover only the money value of the eleven bales of cotton when they fell due on the contract of sale, and interest thereon at eight per cent per annum. Any thing more than this was usurious; and if demanded, only the value of the eleven bales, or what remained due thereon at the date the same fell due on the contract of sale, without interest, could be recovered.—Revised Code, § 1831.—*Neel v. Clay*. 253

INTERNAL REVENUE.

1. *Unstamped instrument; how made available as evidence.*—Where a contract requires a United States revenue stamp, it may be affixed and cancelled by any of the parties. If this is not done at the date of its execution, the instrument can not be received in evidence, and though lost, secondary evidence of its contents can not be admitted. The omission must be supplied in the manner provided by the revenue law.—*Turner v. State*. 549

JUDGMENTS AND DECREES.

1. *What judgment will not support appeal.*—A judgment of the circuit court granting a new trial under section 2814 of the Revised Code, is not such a final judgment as will support an appeal.—42 Ala. 31, 167. *Carroll v. Vaughan*. 352
2. *Judgment in circuit court on appeal from justice's court; when void.*—A judgment by default rendered in the circuit court, on the trial of an appeal from a justice, against the appellee, who has not been notified of the appeal, will be reversed.—*Steadman v. Seawell & Minshill*. . . . 519
3. *Satisfaction of judgment; what act does not amount to.*—A mere levy of an execution by the sheriff on property of the defendant, sufficient in value to satisfy it, is not a satisfaction of the judgment, when the levy is released or abandoned without the concurrence of the plaintiff.—*Summerhill v. Trapp*. 363
4. *Decree; for what reason, not void.*—A decree for the sale of the land of a decedent, and of confirmation of such sale, are not void because rendered by a probate court of the late insurrectionary State government.—*Warnock v. Thomas*. 463
5. *Decree of insolvency; what does not annul.*—The omission of creditors to file their claims against an estate duly declared insolvent, can not annul the decree of insolvency.—*McCuan v. Turrentine*. 68
6. *Judgment against firm will support action against partner.*—A judgment against a partnership in its firm name alone, will support an action against an individual member of the firm to enforce his individual liability for the firm debts.—*Cox v. Harris*. 538
7. *Same.*—The individual liability of each partner for the debts of the firm is not so merged by a judgment against the firm in its firm name only, as to prevent a suit on such judgment against an individual member of the firm to enforce his liability to pay its debts. Judg-

JUDGMENTS AND DECREES—CONTINUED.

- ments, under the provisions of section 2559 of the Revised Code, are in law joint as well as several.—S. C.
8. *Decree, what will be enforced in courts of present State government.*—Mrs. F. and her husband, on the 17th day of June, 1861, obtained a decree in a chancery court, held under the rebel authority, in the county of Greene, in this State, for the use of Mrs. F., as her separate estate, under the will of her father, made in 1838, against O., sheriff, for an improper levy and sale of her property, for \$5,227 48. On this decree execution was issued, and returned "no property found" against O., who was insolvent.—*Held*, that a court of chancery will entertain jurisdiction to enforce the collection of said decree, in the name of the husband and wife in a proper case, as for her separate estate at common law, when the marriage was before our statute upon the separate estate of wife.—*Kirksey et al. v. Friend*. . . . 276
 9. *Proceedings to sell land of decedent in probate court, are in rem.*—An application to the probate court by an executor or administrator of a deceased person to sell the lands of the estate for distribution is, essentially, a proceeding *in rem*, and when the court has acquired jurisdiction by a petition filed containing the jurisdictional facts, an order of sale will not be void for errors that may intervene in the after proceedings of the case.—*De Bardelaban v. Stoudenmire*. 646
 10. *Same; effect of irregularities after jurisdiction attached.*—And whatever irregularities may intervene after jurisdiction attaches by filing the application for sale, are but errors, and they do not render the judgment of the court void for want of jurisdiction; unless it is shown that there has been some neglect of a statutory requirement, which declares the proceeding void on that ground.—Revised Code, section 2225.—S. C.
 11. *Judgment nil dicit in trover; effect of.*—After judgment *nil dicit* in trover the defendant upon execution of the writ of inquiry can not give in evidence subversive of the judgment for the purpose of mitigating the damages.—*Curry v. Wilson*. 638
 12. *Judgment; what not reviewable on appeal under section 2759 of Revised Code.*—Where a plaintiff excepts to the ruling and judgment of the court upon a demurrer, and suffers a non-suit under section 2759 of Revised Code, and appeals to the supreme court, the judgment in the demurrer can not be reviewed in such appeal.—*Darden v. James*. 33
 13. *Judgment against insolvent estates; when must be presented.*—Judgments rendered before a decree of insolvency, must be filed like other claims.—*Whitfield v. Clark*. 55
See, also, DEEDS 8.

JUROR.

1. *Allowance of challenge to juror in civil case, after acceptance; when not erroneous.*—The allowance of a challenge of a juror, before the jury is completed, to a party who has not exhausted his challenges,

JUROR—CONTINUED.

is not error, notwithstanding the party had hastily expressed himself satisfied with the juror challenged.—*Adams v. Olive*..... 551
See this title, under CRIMINAL LAW.

LEASE.

1. *Lease, contract of ; construed.*—In a contract of lease for three years, from November 1, 1864, for \$4,500 a year, payable quarterly, in such currency as the banks in Mobile usually received and paid out at the time, the lessee was authorized to put the property, much out of repair, into tenantable order, the cost of the repairs to be deducted from the rent as it fell due. On the 19th January, 1865, the lessors acknowledged, in writing, an account of \$6,830 for the repairs to be “a credit, that is to say, so much paid on the rent of the building leased.” The lease terminated by consent May 3, 1866,—*Held*, in a suit by the lessors to recover rent from May 1, 1865, to May 3, 1866, that the lessee was not indebted. The change of currency in the spring of 1865, from Confederate to United States treasury-notes, could have no effect to reduce the claim for repairs previously estimated and credited on the rent.—*Mobile Co. v. Hagan*..... 54
2. *Executor ; when not chargeable with rent for which security was not taken.*—Where an executrix was authorized by the will of the testator “to work the place” as if the testator were alive, and invested with a large discretion as to the management and conduct of the estate, she will not be liable, notwithstanding section 2706 of the Revised Code, to account for rent of lands for which she took no other security than the note of the lessees, who were then reputed solvent, but afterwards became insolvent, whereby she failed to collect the rent. *Waller, Adm’r, v. Ray et al.*..... 468

LIEN.

SEE FACTOR, 1, 2, 3

VENDOR AND PURCHASER.

DEBTOR AND CREDITOR.

EXECUTION.

LIMITATIONS—STATUTE OF, AND HEREIN OF NON-CLAIM.

- I. *Interest, payment of by executor on note of testator ; when removes bar of statute of limitations and equivalent to presentation.*—Payments of interest by an executor or administrator on a note, made by the testator or intestate, in his life-time, before the bar of the statute of limitations is complete, are partial payments under § 2914, Revised Code, and will remove the bar to the suit, which, without such payments, would be a good defense to the action. Such payments are, also, an admission, on the part of the executor or administrator that the claim had been duly presented.—*Taylor, Ex’r, v. Perry*..... 240

LIMITATIONS—CONTINUED.

2. *Claim; what not such as required to be presented within nine months of declaration of insolvency, &c.*—A promissory note, upon which a suit is pending at the time an estate is declared insolvent, is not such a suit as is required to be verified by affidavit and filed against such estate within nine months after the declaration of insolvency. Such suit, on revival, may proceed to judgment, and the judgment may be certified and filed as required by the statute. An objection by plea in abatement for a failure to file such note before judgment, is not sufficient to abate the suit.—*Waller, Adm'r, v. Nelson*..... 531
3. *Revival of suit; within what time may be made.*—A motion to revive a suit pending in court, after the death of the plaintiff or defendant, comes in time, if made within eighteen months after the death of the plaintiff or defendant, or within eighteen months after the death or removal of the personal representative, when the first representative died before revival in his name. The mere suggestion of the death of the deceased party upon record is sufficient motion for this purpose, in order to remove the bar of the statute.—Revised Code, § 2542; 35 Ala. 79. *S. C.*
4. *Insolvent estate; what claims against, must be filed to prevent bar prescribed by section 2196 of Revised Code.*—All claims on an insolvent estate, *not in suit* at the time the same is reported and declared insolvent, must be filed in the office of the judge of probate and verified, as required by section 2196 of the Revised Code, whether or not in judgment, either against the deceased or the personal representative; otherwise, they are forever barred. A judgment obtained before the report and declaration of insolvency, not being a claim *in suit*, is barred if not filed and verified within the time and in the manner prescribed in that section.—*Gamble v. Dunklin*..... 425
5. *Same.*—Claims *in suit* against the executor or administrator at the time the estate is reported and declared insolvent, must proceed to judgment, and if judgment be for the plaintiff, and it is shown to the court that the estate has been declared insolvent, an order must be made to the effect that no execution issue on such judgment, but that the same be certified to the proper probate court; and upon a certified copy of such judgment being filed as a claim against the estate, it must be allowed, with the costs against such estate; unless such judgment be shown to have been obtained by collusion. But such judgment need not be filed and verified under said section 2196.—*S. C.*
6. *Same.*—Judgments rendered before decree of insolvency must be presented and filed in the probate court like other claims.—*Whitfield et al. v. Clark et al.*..... 533

MANDAMUS.

1. *When lies to compel reinstatement of cause on docket.*—Mandamus is the proper remedy to compel the reinstatement of a cause upon the docket which had been improperly stricken from it for an alleged

MANDAMUS—CONTINUED.

- non-compliance with an order of continuance on payment of costs.—
Ex parte Abrams. 157
2. *Same*; to compel court to make order of revival.—Where an action is brought against an individual member of a firm on a contract made by the firm and the defendant dies, the action may be revived against the personal representative of the deceased defendant. If the court, on plaintiff's motion, refuses to make the proper order to revive such action, in the name of the personal representative of the deceased defendant, after a *scire facias* has been duly served on him, for that purpose, a *mandamus* will be issued to require the court to make such order.—*Ex parte Ware*. 223
3. *When will not lie to compel change of venue*.—Where the trial of a criminal case has been once transferred from the county in which the indictment was found to another county, *mandamus* will not lie to compel the court to order its retransfer, although the attorneys for the prosecutor and the defendant may have entered into an agreement to that effect.—*Ex parte Dennis*. 304
4. *When will not lie*.—A *mandamus* will not be granted to let in a mere technical defense, founded on defective service of process, and to compel a judge of a circuit court to set aside a judgment by default, because the sheriff has made a false return of service of the summons and complaint on the defendant, when the judgment is on a promissory note, unless the application shows a meritorious defense to the note.—*Ex parte Bell*. 285
5. *When allowed to compel levy of tax, &c.*—Under the facts stated in this case, *mandamus* was held to be the proper remedy to compel the commissioners court of a county to levy a tax to pay interest on bonds issued by the county.—*Commissioners Court v. Rather et al.* . . . 435
6. *When will be allowed to compel approval of bond*.—A writ of *mandamus* is the appropriate remedy to compel judges of probate to approve of sheriffs' bonds, if made in the form, and for the proper amount, and payable and conditioned as required by law, with sufficient sureties, and presented for approval within fifteen days after the election.—*Ex parte Candee*. 387
7. *Practice as to, in supreme court*.—Where an application to show cause why a *mandamus* should not issue has been denied by an inferior court or judge, the petitioner may either take an appeal under the act of the 15th December, 1868, (Pamph. Acts, p. 410,) or he may renew his application to this court, setting forth under oath such a state of the case as shows that the court or judge who made the decision erred to his prejudice, and that he is entitled by the case made before such court or judge to the relief he seeks.—*Ex parte Candee*. 389
8. *Rule to show cause, return to*; how treated and what must state.—On a rule to show cause why a *mandamus* should not issue, the petition is treated as the complaint, and the return to such rule is regarded as the plea, in which the facts stated in the petition must be denied, or

MANDAMUS—CONTINUED.

such other facts stated as show that petitioner is not entitled to the relief he seeks ; and such facts must be set forth with such distinctness, precision and certainty as to enable the court to judge of them, and determine whether they form an excuse or justification sufficient in law.—*Ex parte Candee*. 388

9. *Return to rule nisi, what defenses may set up ; when bad*.—The return need not be single, but may contain several defenses or justifications consistent with each other, and if one is sufficient, the return must be allowed as to that one ; but if the defenses are inconsistent or repugnant to each other, the whole return is bad, because the court can not know which to believe, and taken as a whole, the return is false and will be quashed on the demurrer of petitioner. In such cases, the demurrer is final and not *respondeas ouster*, but a peremptory *mandamus* will be awarded.—*S. C.*

MORTGAGE.

1. *Future crops ; when may be subject of mortgage*.—The crops to be grown on lands leased for three years is a proper subject of mortgage by the lessee to the lessor to secure the rent for the term.—*Jones, Adm'r, v. Webster*. 109
2. *Future crops ; mortgage on, when notice though not recorded*.—Where lessees shared their lease with others who were to receive half of the crop to be grown on the premises, and who knew that their copartners were the tenants of another, the latter are chargeable with notice of a mortgage on the crop given by the former to the lessor to secure the rent, although it was not recorded at the date of their contract.—*S. C.*
3. *Trover by mortgagee against mortgagor ; when will lie*.—Trover will lie in favor of the mortgagee against the mortgagor and his consignee, notwithstanding the mortgage stipulated that on or before the law day the goods were to be shipped by the mortgagor, who retained possession, to a factor of his own selection, who was to sell them for the benefit of the mortgagee, if they appropriate them to their own use, by sale or otherwise, before or after the law day.—*S. C.*
4. *What held to be mortgage*.—A contract purporting to be a sale, by the terms of which the vendee is to sell the property and out of the proceeds pay an antecedent debt of the vendor, and any deficiency to be made good by him, is in effect a mortgage.—*Cannon v. McNab and Bank*. 99
5. *Language in case at bar ; what held not to apply*.—A mortgage of lands which conveys the property generally, and in the conditional part empowers the mortgagee "to take possession of said property, reserving alone the amount of the land which the law exempts as a homestead," and the same to sell, &c., does not convey the homestead nor authorize a decree of foreclosure against it.—*Ray v. Wragg* 52
6. *Bill to foreclose ; who material defendant*.—A purchaser from a mortgagor of mortgaged premises, who has himself mortgaged them to

MORTGAGE—CONTINUED.

his creditor, is a material defendant to a bill of foreclosure filed by the first mortgagee, notwithstanding his mortgagee has sold the property and become the purchaser, if he retains his equity of redemption.—*Merritt v. Phenix*. 87

7. *Same*; *mesne purchasers not necessary parties*.—To foreclose a mortgage, it is not necessary that mesne purchasers who have no interest should be brought before the court.—*S. C.*

See HUSBAND AND WIFE, 2, 3, 8, 9.

NEGLIGENCE.

1. *Property, owner of*; *for what injuries liable*.—Every owner of property, in this State, holds and enjoys it under the limitations, that it must be so used as not to injure the person or property of any other person, if such injury can be reasonably prevented. If an injury occur through the negligence of the owner he will be liable.—*Garlick v. Dorsey*. 220
2. *Same*; In an action for the value of a mule, killed by the shaft of a wagon of defendant, with which the horse was running away, it must be shown that the owner of such horse and wagon was negligent in permitting the horse to escape and run off with the wagon. In such case the question of negligence must be left to the jury.—*S. C.*
3. *Negligence*; *what competent evidence of*.—In an action by a passenger to recover damages for personal injuries occasioned by a run-off, evidence that the train on which the accident occurred and of which witness was conductor, had run off the track seven or eight times within a month before the accident, is admissible.—*M. & M. R. R. Co. v. Ashcraft*. 15
4. *Same*; *what not competent evidence of*.—In an action for damages against a rail road company for injuries to the person, declarations made by the conductor of the train to a passenger, a moment before the accident, of the bad condition of the road and his train having run off the track five consecutive times next preceding the present trip, are not admissible in proof of negligence, either as *res gestæ*, or as admissions of an agent binding on the principal.—*M. & M. R. R. Co. v. Ashcraft*. 16
5. *Same*; *what competent to avoid charge of contributory negligence*.—The plaintiff having received his injuries by leaping from the car, while others who remained inside were not hurt, it is proper for him to prove that others besides himself did the same, and also their declarations at the time of their reasons for so doing, to show the reasonableness of his conduct and to avoid the charge of contributory negligence.—*M. & M. R. R. Co. v. Ashcraft*. 16
6. *Common employer*; *when not liable for injuries to servant occasioned by neglect of fellow-servant*.—A common employer is not liable to his servant for injuries done to him through the negligence of his fellow-servant in the pursuit of their common business, without fault on his part.—*Ala. & Fla. R. R. Co. v. Waller*. 459

NEGLIGENCE—CONTINUED.

7. *Same*.—He is liable, when the offending servant is incompetent in skill or prudence, within his knowledge, or his reasonable means of ascertainment.—*S. C.*
8. *Care required in selection of employes, &c.*—Ordinary care and diligence in the selection and supervision of servants or employes is not sufficient. There must be due or reasonable care and diligence proportionable to the hazard of the business.—*S. C.*
9. *Fitness of servants; what plea as to, demurrable*.—The defendant's supposition of the fitness of the engineer, as a reason for retaining him, is, as a plea to the action, subject to demurrer.—*S. C.*
10. *What sufficient averment of negligence of servant*.—In an action of damages against a railroad company, by an administrator, for injuries causing the death of his intestate, an averment in the complaint that the intestate received the injuries from which he died by a collision of the defendant's trains, through the carelessness of its engineer in charge of one of them, is not subject to demurrer for an insufficient statement of facts.—*S. C.*
11. *Negligence; what evidence not sufficient to charge administrator with*.—Where the administrator *de bonis non* appears on the settlement of the resigned administrator, and examines the accounts, and, without filing exceptions, consents that the same may be allowed, this is not sufficient, on any subsequent settlement, to charge him with negligence, unless it clearly appears that said account, or items in it, were improper and should have been disallowed, and that he omitted to file exceptions from motives of bad faith.—*Waller v. Ray et al.* 468

NOTICE.

1. *Judicial notice*.—The journals of the two houses of the general assembly are public records, of which the courts will take *judicial notice*, and if it appears from said journals that an act was not passed according to the forms of the Constitution, it will be declared not to have the force of law.—*Moody v. State* 115
2. *Future crops; mortgage on, when notice though not recorded*.—Where lessees shared their lease with others who were to receive half of the the crop to be grown on the premises, and who knew that their co-partners were the tenants of another, the latter are chargeable with notice of a mortgage on the crop given by the former to the lessor to secure the rent, although it was not recorded at the date of their contract.—*Jones v. Webster* 638
3. *Purchaser from one holding bond for title; chargeable with notice of what*.—A party who buys land from one holding only a bond for titles, and takes an assignment of the bond for titles, as the evidence of his purchase, is charged with notice that the purchase-money is unpaid, and is a lien on the estate. He will not be regarded as a *bona fide* purchaser for valuable consideration without notice.—*Edmonds v. Torrence* 38
4. *Notice to produce demand in writing; when not sufficient*.—In unlawful detainer, a notice, to produce the written demand, given by the plaintiff

NOTICE—CONTINUED.

- to the defendant's counsel at the trial, is not sufficient in point of time, without proof that the paper is in court, or so near that it can be obtained without delaying the trial. There is no presumption that the defendant or his counsel has it in court.—*Bates v. Ridgway* 611
5. *Notice of motion to dissolve injunction; when insufficient.*—Notice to complainants that application will be made to the chancellor in vacation to dissolve an injunction "at Lafayette, in Chambers county, Ala., or at such place as said chancellor may be required to be by law," is void for uncertainty.—*Paschal v. Florence*..... 458

OFFICE—OFFICER.

1. *Office; what does not vacate.*—The office of a sheriff is not vacated by his failure to file his official bond in the office of the judge of probate of his county, within fifteen days after his election. Such failure may be a cause of forfeiture and vacancy, which may be taken advantage of and enforced by the State, in a proper judicial proceeding for that purpose.—*Ex parte Candee*..... 389
2. *Office, proceeding to declare forfeiture of; what good defense to.*—In such a proceeding, it is a good defense to show that a sufficient bond was presented within the time prescribed, and that the judge of probate refused to approve of, and file the same in his office, without any legal reason for his refusal.—*S. C.*
3. *Public officer, time in which act is to be performed by; when directory merely.*—A statute prescribing a period of time within which public officers are to perform official acts regarding the rights of others, will, as to third persons, be held to be *directory* merely, and not to invalidate or prevent official acts after the expiration of the specified time, unless the nature of the act to be performed, or the spirit of the statute, force a contrary conclusion.—*Commissioners Court v. Rather et al.*..... 433
4. *Acts of person disqualified to hold office; valid as acts of de facto officials, until inquisition of office.*—The official acts of a person disqualified to hold office, "by reason of his participation in the late rebellion of the so-called Confederate States against the United States," are not void, when such person holds his office under authority of the rightful government of the State, until after his right to the office is determined against him in some legal way.—*Lockhart et al. v. City of Troy*..... 579

PART-OWNER.

1. *Part owner of vessel; what interest can sell.*—One part owner of a vessel has no authority to sell more than his own interest.—*Graham v. Cook et al.*..... 103

PARTNERSHIP.

1. *Partner; how may be sued to enforce firm liability.*—A judgment against a partnership in the firm name alone, will support an action

PARTNERSHIP—CONTINUED.

- against an individual member of the firm to enforce his individual liability for the firm debts.—*Cox v. Harris*..... 338
2. *Same*.—The individual liability of each partner for the debts of the firm is not so merged by a judgment against the firm in its firm name only, as to prevent a suit on such judgment against an individual member of the firm to enforce his liability to pay its debts. Judgments, under the provisions of section 2559 of the Revised Code, are in law joint as well as several.—*S. C.*
3. *Copartnership; when can not be sued for debts of old firm, a portion of the partners of which, constitute new firm*.—A new firm, though composed entirely of a portion of the members of a former partnership which is dissolved, can not be sued jointly in their firm name for the liabilities of the old firm.—*Shorter, Papot & Co. v. Hightower*..... 526
4. *Partner, action against; how may be revived*.—An action may be brought against one member of a partnership firm, on a contract made by the firm. In such an action, on the death of the defendant, the same survives against the personal representative of the deceased, and may be revived in the name of such representative as defendant.—*Ex parte Ware*..... 223
5. *Mandamus; when will lie to compel court to make order of revival*.—If the court, on plaintiff's motion, refuses to make the proper order to revive such action, in the name of the personal representative of the deceased defendant, after a *scire facias* has been duly served on him, for that purpose, a mandamus will be issued to require the court to make such order.—*S. C.*

PAYMENT.

1. *Payment of interest by executor on note of testator; when removes bar of statute of limitations and equivalent to presentation*.—Payments of interest by an executor or administrator on a note, made by the testator or intestate, in his life-time, before the bar of the statute of limitations is complete, are partial payments under § 2914, Revised Code, and will remove the bar to the suit, which, without such payments, would be a good defense to the action. Such payments are, also, an admission, on the part of the executor or administrator, that the claim had been duly presented.—*Taylor, Ex'r, v. Perry*..... 240
2. *Promissory note given by executor for debt of testator; effect of*.—A promissory note given by an executor or administrator, for a debt of the testator or intestate, is neither a payment nor an extinguishment of such debt. At most, it only suspends the right of action on the original debt, until the maturity of such note. The transfer of such a note by delivery, operates to pass to the holder the real interest in the original debt, and, under § 2523, Revised Code, authorizes and requires him to sue for its recovery in his own name.—*S. C.*
3. *Payments of interest on new note; effect of, on original debt*.—Payments of interest on such a note, are, in legal effect, partial payments upon

PAYMENT—CONTINUED.

the original debt, and preserve it from the influence of the statute of limitations.—*S. C.*

PLEADING AND PRACTICE.

I. COMPLAINT.

1. *Complaint; what is in case and is sufficient.*—A complaint which sets forth that the defendants, as commission merchants, received from the plaintiff certain described goods for sale for a reward, under instructions not to sell them for less than a specified price, which they promised to observe, but that they did afterwards sell the said goods for less than that amount, to-wit, the sum of —, &c., is in case, and sufficiently states a breach of duty.—*Beavers v. Hardee & Co.* . . . 95
2. *Same; complaint against; what must show.*—A complaint against a county to recover damages for a fall resulting from the insufficiency or unsafe condition of a public bridge, must set forth a statement of facts which show the existence of this special liability. Among other things, it must be stated that no guaranty had been taken from the builder of the bridge, or that such a guaranty had been taken, and that the time during which it was to continue had expired before the occurrence of the injury complained of.—*Barbour County v. Horn.* . . 649
3. *Indebitatus assumpsit; when will lie.*—Where the terms of a special unsealed agreement have been performed by the plaintiff, so that only a duty to pay money remains, *indebitatus assumpsit* will lie, but where the agreement is still open, or is to be performed in future, the count must be framed on the agreement.—*Darden v. James.* 33
4. *Plaintiff failing on special count; when may recover on general counts.*—Where the plaintiff declares on a special agreement, seeking to recover thereon, but fails, he may recover on the general counts, if the case be such that he might have recovered, if there had been no special contract.—*S. C.*
5. *Recovery, when may be had on common counts; when on special contract.*—If the plaintiff's right to the money depends upon a subsisting agreement between the parties, the action must be upon the special contract; but if the plaintiff's right to the money is wholly independent of the agreement, then he may recover on the common counts.—*S. C.*
6. *Damages for breach of special contract; upon what plaintiff must count to recover.*—Where damages are claimed for the breach of a special contract, the plaintiff must count upon the contract.—*S. C.*
7. *Account stated; what necessary to recover on.*—To enable a plaintiff to recover on a count upon an account stated, he must prove, either an actual accounting together, or—what the law holds to be equivalent—an admission by the defendant, expressed or clearly implied, that a fixed certain sum is due to the plaintiff by the party making the admission.—*Ryan v. Gross.* 390
8. *Joinder of causes of action.*—A cause of action against the husband only, can not be joined with an action prosecuted against the husband and wife jointly, for the purpose of enforcing a liability against

PLEADING AND PRACTICE—CONTINUED.

- her separate estate for articles of comfort and support of the family.—*May et ux. v. Smith et al.* 463
9. *Averment of ownership.*—Where several counts in a complaint, on contracts for the payment of money, whether express or implied, follow each other in succession, and in the last of said counts it is averred "that all right to all of said claims became vested in plaintiff by delivery," such an averment is, under § 2523 of the Revised Code, a sufficient averment that the plaintiff is the party really interested in said several claims.—*Taylor, Ex'r, v. Perry.* 240

II. AMENDMENT OF COMPLAINT.

10. *Action against executrix; what amendment permissible.*—Where the action is against an executrix, and the complaint is on a note made by her, as executrix, to which a demurrer is filed, because it does not show any cause of action against her, as executrix, the complaint may be amended by adding counts, stating an indebtedness by testator, in his life-time, and striking out the count on the note described in the original complaint.—*Taylor v. Perry.* 240
11. *Amended complaint; objection to filing of, when properly overruled.*—An objection to a motion for leave to file an amended count to the complaint, that states no reason for the objection, may be overruled without error.—*Reynolds v. Dismuke.* 209

III. PARTIES.

12. *Misjoinder of parties plaintiff; what is, in unlawful detainer.*—Where a complaint in unlawful detainer by two plaintiffs, seeking the recovery of the whole premises detained by a defendant, showed that the two plaintiffs were each separately in possession of the tract of land; that each separately rented his undivided interest in the lands to the same defendant, but at different times and upon different terms; that the terms of each lease had expired, and that each plaintiff had separately demanded possession of the undivided interest which he had rented to the defendant, and that the defendant refused to deliver possession after such demand,—*Held*, that it was bad, on a demurrer, for misjoinder of parties plaintiff.—*Ware & Wilson v. Warnick.* 295

IV. PLEAS.

13. *Justices court; objection to jurisdiction of.*—An objection to the jurisdiction of the justice, on appeal to circuit court, in respect to the amount in controversy, must be taken by demurrer or plea in abatement. The plaintiff can not be non-suited because the proof develops a larger sum due him than he has claimed.—*Long v. Bakefield.* 608

V. DEMURRER.

14. *Judgment on demurrer; when does not authorize appeal and non-suit under section 2759 of the Revised Code.*—Where a complaint contains a count on a special agreement, with the common counts, and a demurrer to the special count is sustained, and the parties go to trial on the common counts, and on the trial evi-

PLEADING AND PRACTICE—CONTINUED.

dence offered by the plaintiff is excluded by the court, and, thereupon, the plaintiff excepts to the ruling of the court, and suffers a non-suit under section 2759 of the Revised Code, and appeals to this court to have the non-suit set aside, the decision of the court on the demurrer can not be reviewed on such appeal.—*Darden v. James*.....

33

15. *Same*.—The practice of taking a non-suit on sustaining a demurrer to the complaint in the court below, and appealing from the judgment on demurrer to this court, and here moving to set aside the non-suit, is not approved. By such a ruling in the court below, the complainant is not compelled to take a non-suit.—*Welch v. Mayor of Marion*.....

291

VI. NON-SUIT.

16. *When properly taken*.—Where an action, founded on a promissory note, is tried on plea of the general issue and failure of consideration, if on the trial the note is excluded by the court as evidence, on the defendant's objection, the plaintiff may save the point by bill of exceptions, suffer a non-suit, and appeal to this court to have the same set aside under section 2759 of the Revised Code.—*Hubbard, Guardian, v. Baker*.....

491

VII. SECURITY FOR COSTS.

17. *Security for costs; what insufficient, but will prevent dismissal of suit*. A deposit of ten dollars with the clerk of the court, as security for the costs of a suit commenced by a plaintiff who is required to give such security, is insufficient in amount, but is not an omission or failure to give security. The plaintiff may perfect the security.—*Stribbling v. Bank*.....

457

VIII. SUPERSEDEAS.

18. *Supersedeas, petition for, praying quashing of execution; what should contain*.—A petition praying to have an execution quashed, should be accompanied by a copy of the execution, or otherwise contain an accurate description of it. Without this the petition is bad for uncertainty.—*Summerhill v. Trapp*.....

363

IX. REVIVOR.

19. *Revival of suit; within what time may be made*.—A motion to revive a suit pending in court, after the death of the plaintiff or defendant, comes in time, if made within eighteen months after the death of the plaintiff or defendant, or within eighteen months after the death or removal of the personal representative, when the first representative died before revival in his name. The mere suggestion of the death of the deceased party upon record is sufficient motion for this purpose, in order to remove the bar of the statute.—Revised Code, § 2542; 35 Ala. 79.—*Waller, Adm'r, v. Nelson*.....
20. *Trustee of express trust, suit by; when does not abate, and how may be revived*.—Where the trustee of an express trust commences an action

531

PLEADINGS AND PRACTICE—CONTINUED.

- on a promissory note belonging to the trust estate, and resigns, the action is not thereby abated, but may be revived in the name of his successor, and if, after an order is made reviving the suit in the name of such successor, the court, on defendant's motion, strikes the case from the docket, and renders a judgment against the plaintiff for the costs, on appeal the judgment will be reversed, and the cause remanded for further proceedings, &c.—*Dumas v. Robins.* . . . 545
21. *Partner, action against; how revived.*—An action brought against one member of a firm, on a partnership contract, survives against the personal representative of the deceased, and motion properly made must be revived against his personal representative.—*Ex parte Ware.* 223
- See, also, *Waller v. Nelson.* 631

REVISED CODE OF ALABAMA.

1. § 1450. Indenture under, how regarded.—*Owen v. State.* 328
2. § 1535. What equivalent to witness required by.—*Merritt et al. v. Phenix.* 87
3. § 1548. What acknowledgment defective under.—*S. C.*
4. §§ 1827–8. What contract usurious.—*Neel v. Clay.* 254
5. § 1862. Original undertaking.—*Marx v. Bell, Moore & Co.* 498
6. § 2061. Exemption child entitled to.—*Hudson v. Stewart.* 204
7. § 2196. Construed as to filing of claims.—*Gamble v. Dunklin.* . . . 425
8. § 2221. What equivalent to word “equitably.”—*Warnock v. Thomas* 463
9. § 2232. Settlement authorized by, final.—*Waller v. Ray et al.* . . . 468
10. § 2371. Construed.—*Denechaud v. Berrey.* 604
11. § 2375. Construed.—*Becton v. Selleck.* 226
12. § 2376. Separate statutory estate, for what not liable.—*May et ux v Smith et al.* 483
13. § 2523. Who “really interested” in meaning of.—*Yerby v. Sexton* 311
14. § 2542. Revivor.—*Dumas v. Robbins.* 546
15. § 2539. To what applies.—*Cox v. Harris.* 538
16. § 2700. To what case does not apply.—*Waller v. Ray et al.* 468
17. §§ 2755–58. Construed.—*Strauchbridge v. State.* 308
18. § 2759. What rulings not reviewed on appeal under.—*Darden v. James.* 33
19. § 2814. What not final judgment under.—*Carroll v. Vaughn.* 352
20. § 2961. Applies to crop advances.—*McKinney v. Benagh, Adm'r.* 358
21. § 3442. Requisites of bill filed under.—*Mixon v. Dunklin.* 455
22. § 3680. What necessary to sustain appeal under.—*Morgan v. Jones.* 250
23. §§ 3488–92. Construed.—*Shulman, Goetter & Weil v. Brantley & Copeland* 193
24. §§ 3602–3. Unconstitutionality of.—*Burns v. State.* 195
25. § 3621. “Keno” within provisions of.—*Miller v. State.* 125
26. § 3625. What indictment under, bad.—*Perez v. State.* 356

CODE OF ALABAMA—CONTINUED.

27. § 3691. To what case does not apply.—*Turner v. State*..... 549
 28. § 3695. Sufficiency of indictment under.—*Anderson v. State*.... 665
 See, also, *Bell & Murray*..... 684
 29. § 3930. Jurisdiction Mobile city court.—*Levy v. State*..... 171
 30. § 4068. Juries in city court of Mobile.—*S. C.*
 31. § 4088. Same.—*S. C.*
 32. § 4171. Presumption as to compliance with.—*Morgan v. State*.... 65
 33. § 4173. When held to be waived.—*Williams v. State*..... 85
 34. § 4198. To what only applies.—*Taylor v. State*..... 180
 35. § 4206. Venue changed but once.—*Ex parte Dennis*..... 304

RAILROADS.

See COMMON CARRIERS, 1, 2, 3, and NEGLIGENCE, 3—10.

REHEARING UNDER ORDINANCE 39 OF CONVENTION OF 1867.

1. *Motion to strike cause from docket and to set aside order granting new trial; when proper practice.*—At a rehearing of a cause, after new trial granted at a subsequent term of the court, under ordinance 39 of the convention of 1867, and the act of December 10th, 1868, extending it, it is a proper practice, when the grounds for granting a new trial were insufficient, to move to strike the cause from the docket and to set aside the order for a new trial.—*Buchanan v. Reese*..... 553
 2. *Same, when grant of new trial is vacated; party entitled to judgment of what date.*—The legislation referred to was special, and applied to peculiar circumstances, and the party is entitled to have his judgment of the date when he rightfully obtained it.—*S. C.*

SHERIFF.

See BONDS, 1 to 6,

OFFICER, 1, 2.

TRESPASS, 1.

EXECUTION, 4, 5.

SURETY.

See DEBTOR AND CREDITOR, 4, 7.

EXECUTION, 1, 3, 4, 8.

TRESPASS, 1.

TAXATION.

1. *Taxation; what not subject to, under revenue law of 1868.*—Gold and United States treasury-notes on deposit in New York and stocks of foreign corporations, owned by a citizen of this State, are not subject to taxation by the State under any provision of the revenue law of 1868.—*Varner, Ex'r, v. Calhoun, Tax Collector*..... 178

TRESPASS.

1. *What is, and who are partakers in.*—The seizure and sale by the

TRESPASS—CONTINUED.

sheriff of the property of W. without his consent, under pretense of authority of an attachment against the estate of McD., is a trespass on the part of the sheriff, and all those who advise or participate in the seizure or sale are co-trespassers with the sheriff.—*Screws v. Watson*..... 628

See BONDS, 1, 2.

TROVER.

1. *Trover by mortgagee against mortgagor; when will lie.*—Trover will lie in favor of the mortgagee against the mortgagor and his consignee, notwithstanding the mortgage stipulated that on or before the law day the goods were to be shipped by the mortgagor, who retained possession, to a factor of his own selection, who was to sell them for the benefit of the mortgagee, if they appropriate them to their own use, by sale or otherwise, before or after the law day.—*Jones, Adm'r, v. Webster*..... 109
2. *Damages, ascertainment of after judgment nil dicit; what evidence inadmissible.*—In ascertaining the damages to which the plaintiff is entitled, after judgment by default or *nil dicit* in trover, evidence which can only mitigate the damages by subverting the judgment, is inadmissible.—*Curry v. Wilson*..... 638
3. *Conversion of goods; when may be deemed to be of best quality.*—When the quality of the goods converted is not shown, they may be assumed to have been of the best quality.—*S. C.*

VARIANCE.

1. *What is not, in suit on attachment bond.*—In a suit for damages brought on attachment bond, the record of the proceedings in the attachment suit is not inadmissible on the ground of variance, because the defendant is sued as James Olive, and the record shows that the bond was signed by James A. Olive. A man can not have two christian names in law.—*Adams v. Olive*..... 551

VENDOR AND PURCHASER.

1. *Contract for sale of land; to what vendor's lien attaches.*—A contract for the sale of lands in this State, to be paid for partly in money and partly in bales of cotton, is such a sale as secures to the vendor all the rights incident to a vendor's lien, upon a failure to deliver the cotton at the time agreed on, and such lien may be enforced by bill in chancery.—*Neel v. Clay*..... 252
2. *Vendor's lien; what constitutes.*—Where land is appropriated to the payment of a debt, by authority given to the creditor to sell it for that purpose, the note of the vendee payable to such creditor, in pursuance of the agreement, carries with it the vendor's lien.—*Roper v. Day*..... 509
3. *Same.*—If a vendee who has not paid the purchase-money, sell the

VENDOR AND PURCHASER—CONTINUED.

land, requiring his purchaser to satisfy such outstanding liability, and it is done by the substitution of the purchaser's note, the vendor's lien accompanies the note as a transfer of the right to receive the purchase-money, to the exclusion of a balance due to such vendee; especially when the original creditor only consents to the arrangement on that condition.—*S. C.*

4. *Same; who entitled to enforce vendor's lien.*—If one, to whom the original creditor has assigned the note of the last purchaser, buys the land from him in consideration of it, the vendor of the purchaser may, by paying the note, have a decree for the sale of the land in satisfaction of a balance due him.—*S. C.*
5. *Vendor's lien; when exists, and by whom may be enforced.*—A vendor who sells real estate and takes a promissory note for the payment of the purchase-money, and gives the vendee a bond for titles when the note is paid, has a lien on such real estate to secure the payment of the note, and if the vendor endorses the note to a third person the lien is transferred to the indorsee, and he may enforce the same in equity in his own name.—*Edmonds v. Torrence*. 38
6. *Purchaser from one holding bond for title; chargeable with notice of what.* A party who buys the estate of such a vendee, and takes an assignment of the bond for titles, as the evidence of his purchase, is charged with notice that the purchase-money is unpaid, and is a lien on the estate. He will not be regarded as a *bona fide* purchaser for valuable consideration without notice.—*S. C.*

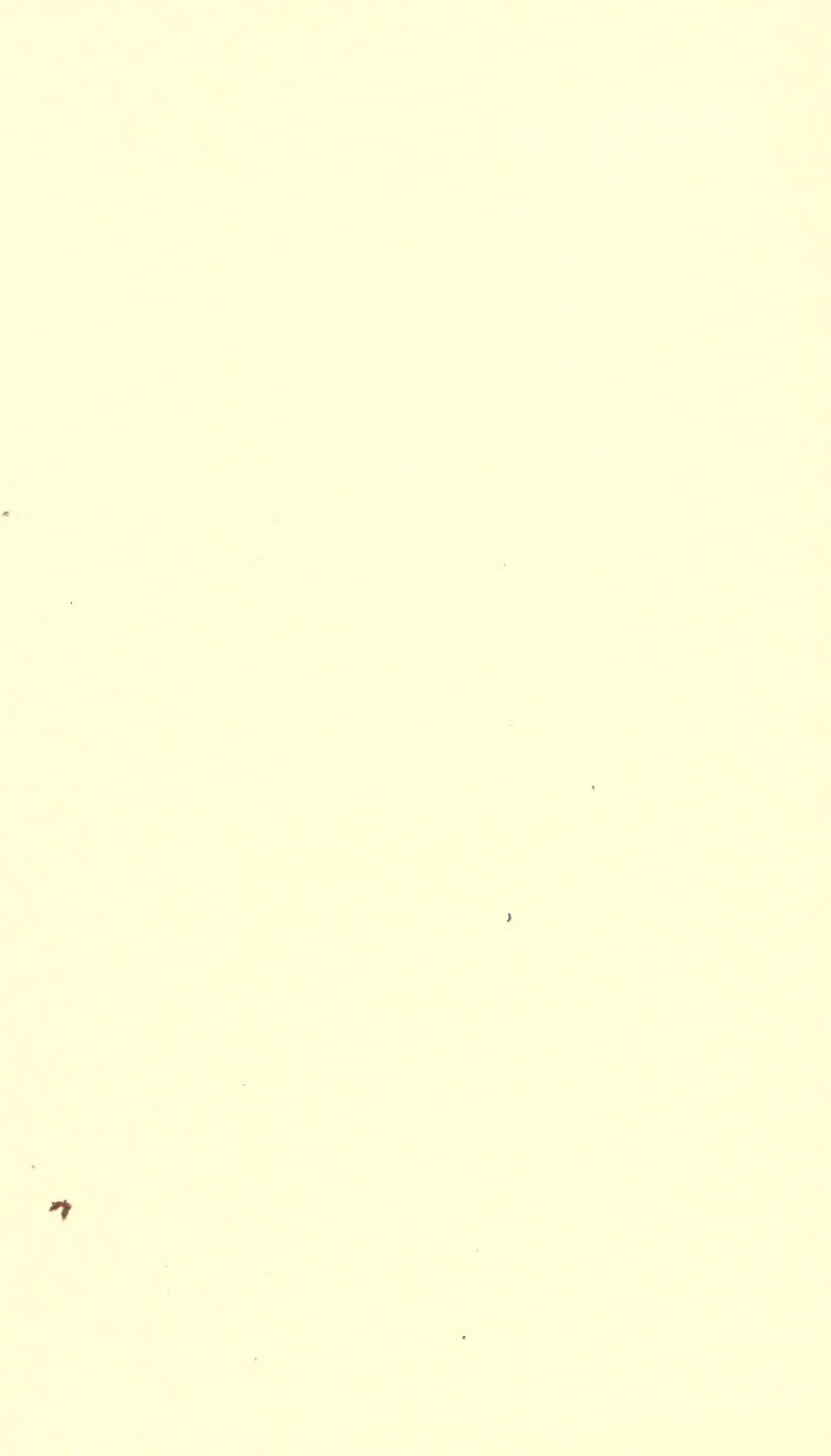
See EXECUTORS AND ADMINISTRATORS, 17.

FRAUDS, STATUTE OF.

WITNESS.

1. *Competency of parties; does not destroy jurisdiction of chancery as to bills of discovery.*—The change in the law of evidence which allows parties to the suit to be examined as witnesses, does not take away the jurisdiction of chancery to compel a discovery.—*Cannon v. McNab and Bank*. 99
2. *Impeachment; what can not be matter of.*—A witness can not be questioned, on cross examination, about a matter not relevant to the issue for the purpose of laying a ground to impeach him.—*Marx v. Bell, Moore & Co.* 498
3. *Opinion of witness; what question as to process of arriving at, may be properly disallowed.*—A witness called without objection, to prove the value of the hire of certain slaves in 1863 in lawful money, from facts in evidence, and his general knowledge of such matters, after stating his estimate, was asked, on cross-examination, how he arrived at his opinion. The court sustained an objection to the question,—*Held*, not error, because the question was too indefinite.—*Booker v. Adkins*. 529

See CRIMINAL LAW.



UC SOUTHERN REGIONAL LIBRARY FACILITY



A 001 167 787 9

